Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05(HC)-38–03 OF 2021(W), 05(HC)-41–03 OF 2021(W), 05(HC)-43–03 OF 2021(W), 05(HC)-42–03 OF 2021(W), 05(HC)-44–03 OF 2021(W), 05(HC)-45–03 OF 2021(W), 05(HC)-106–06 OF 2021(W), 05(HC)-107–06 OF 2021(W), 05(HC)-108–06 OF 2021(W), 05(HC)-109–06 OF 2021(W), 05(HC)-110–06 OF 2021(W), 05(HC)-111–06 OF 2021(W), 05(HC)-112–06 OF 2021(W), 05(HC)-113–06 OF 2021(W), 05(HC)-114–06 OF 2021(W), 05(HC)-115–06 OF 2021(W), 05(HC)-116–06 OF 2021(W), 05(HC)-117–06 OF 2021(W), 05(HC)-118–06 OF 2021(W), 05(HC)-119–06 OF 2021(W), 05(HC)-120–06 OF 2021(W), 05(HC)-121–06 OF 2021(W), 05(HC)-122–06 OF 2021(W), 05(HC)-123–06 OF 2021(W) AND 05(HC)-124–06 OF 2021(W)

TENGKU MAIMUN CHIEF JUSTICE, ZAWAWI SALLEH AND NALLINI PATHMANATHAN FCJJ

14 FEBRUARY 2022

Criminal Procedure — Habeas Corpus — Preventive detention — Detention under Prevention of Crime Act 1959 ('POCA') — Appellants applied for habeas corpus — High Court dismissed applications for habeas corpus — Appellants filed appeals — Whether appeals academic — Whether online gambling simpliciter fell within scope of POCA — Whether POCA applied to non-nationals or foreign nationals or restricted to Malaysian citizens — Federal Constitution arts 5(2), 8(1), 149, 151(1)(a) & (b) — Prevention of Crime Act 1959 ss 3, 4(1)(a) & 19A

The appellants were the nationals of the People's Republic of China. The appellants were detained under the Prevention of Crime Act 1959 ('the POCA') in relation to 'the organisation and implementation of online gambling' which was stated to be in contravention of the provisions of POCA. There were 25 cases heard before the High Court in relation to the applications for habeas corpus. In the first six cases ('the six appeals'), the appellants sought to challenge the remand and detention of the appellants under s 4(1)(a) of the POCA whereas in the remaining 19 cases ('the 19 appeals'), the appellants sought to challenge the detention of the appellants under s 19 of the POCA. In all the cases, the appellants further sought declarations that the arrest and remand of the appellants was unlawful because online gambling did not fall within the purview or scope of the POCA. It was further contended that POCA did not apply to foreign nationals. The High Court dismissed the appellants' applications, hence, the present appeals. The issues arose were: (a) whether the appeals were academic ('the preliminary issue'); (b) whether

online gambling simpliciter fell within the scope of the POCA; and (c) whether the POCA applied to non-nationals or foreign nationals or was restricted to Malaysian citizens. In relation to the preliminary issue, there were two separate situations. The first situation was premised on the argument that the initial preventive detentions upon which the applications for habeas corpus were premised had become academic because they were superseded by subsequent preventive detention orders, effectively abrogating the High Court's Constitutional duty under art 5(2) of the Federal Constitution ('the Constitution'). The second situation was the specific allegation that the preventive detentions had become academic by virtue of the fact that the detainees concerned had, after filing their applications for habeas corpus, been released.

Held, allowing the appeals:

(1) In respect of the preliminary issue, the court agreed with the case of *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759; [2021] 5 CLJ 581 ('Zaidi bin Kanapiah') in that, in relation to the six appeals, the fact that the detention was one under s 19A of the POCA rather than s 4(1)(a) of the POCA did not render the applications academic because at the date of the filing of the application, the six applicants were indeed detained under s 4(1)(a) of the POCA. In addition, the application specifically sought release from detention under the provisions of ss 3, 4 and any other provisions of the POCA. That in itself warranted the court inquiring into the matter in view of its mandatory constitutional duty of review under art 5(2) of the Constitution. The judge failed in his duty and erred in law when he failed to undertake the review and to make decision on this point, holding that it was academic. As for the applicants in the 19 appeals, the fact that they were now free from detention under the POCA and that the relevant period of detention of six months having expired did not preclude them from challenging the decision of the High Court on the issue. The issue remained 'live' on appeal (see paras 136–138).

(2) The recital of the POCA referred solely to the criterion set out in limb (a) of art 149 of the Constitution and made no reference to limbs (b)–(f). In addition, each of the limbs was separated using the word 'or' expressly which warranted a construction that each limb was to be read disjunctively. The POCA was promulgated pursuant to art 149 of the Constitution specifically to stop action which caused a substantial number of citizens to fear organised violence against persons or property and not any of the other limbs in art 149 of the Constitution. The High Court judge applied an erroneous and unwarranted method of statutory interpretation to the POCA which was enacted pursuant to the restrictive and special emergency provisions set out in art 149 of the Constitution. This was the long accepted principle that any such emergency powers

which restricted the fundamental liberties were to be read narrowly, rigidly and strictly. Therefore, the court was constrained to depart from, and overrule that part of the majority decision in *Zaidi bin Kanapiah* relating to whether online gambling simpliciter fell within the purview of the POCA. The court held and reasserted that online gambling simpliciter did not fall within the purview of para 5, Part I, First Schedule of the POCA because there was no nexus between the online gambling and organised violence as envisaged under the POCA (see paras 158–160, 163, 167, 174 & 182).

(3) The use of the words 'person' in art 151(1)(a) of the Constitution and 'citizen' in art 151(1)(b) of the Constitution was deliberate and both provisions were capable of being harmoniously construed. Part XI of the Constitution dealt specifically with national security and how to deal with threats against such risk. The risk posed by citizens and non-nationals may well be dissimilar and diverse. Accordingly, the promulgation of legislation which treated the two categories of persons differently was premised on a rational basis, namely distinct and intelligible criteria, which met the objective of art 149 of the Constitution. Therefore, the lack of provision of further safeguard in art 151(1)(b) of the Constitution did not offend art 8(1) of the Constitution. This was particularly so as the fundamentals of natural justice were accorded due recognition and effect in art 151(1)(a) of the Constitution. For these reasons, the court concluded that the POCA applied to both citizens and non-citizens or foreign nationals (see paras 185, 193, 195 & 199).

[Bahasa Malaysia summary

Perayu-perayu adalah warganegara Republik Rakyat China. Perayu-perayu telah ditahan di bawah Akta Pencegahan Jenayah 1959 ('APJ') berhubung 'penganjuran dan pelaksanaan perjudian dalam talian' yang dinyatakan melanggar peruntukan APJ. Terdapat 25 kes yang dibicarakan di Mahkamah Tinggi berhubung dengan permohonan untuk habeas corpus. Dalam enam kes pertama ('enam rayuan tersebut'), perayu telah mencabar perintah reman dan penahanan perayu di bawah s 4(1)(a) APJ manakala dalam baki 19 kes lagi ('19 rayuan tersebut'), perayu telah mencabar penahanan perayu di bawah s 19 APJ. Dalam kesemua kes, perayu-perayu selanjutnya memohon pengisytiharan bahawa penahanan dan reman perayu-perayu adalah menyalahi undang-undang kerana perjudian dalam talian tidak termasuk dalam bidang kuasa atau skop APJ. Dihujahkan lagi bahawa APJ tidak terpakai kepada warga asing. Mahkamah Tinggi menolak permohonan perayu, justeru, rayuan semasa. Isu-isu yang timbul ialah: (a) sama ada rayuan-rayuan tersebut bersifat akademik ('isu awal'); (b) sama ada perjudian dalam talian secara ringkasnya termasuk dalam skop APJ; dan (c) sama ada APJ terpakai kepada bukan warganegara atau warga asing atau dihadkan kepada warganegara Malaysia

sahaja. Berhubung dengan isu awal, terdapat dua situasi yang berbeza. Situasi pertama adalah berdasarkan hujah bahawa penahanan pencegahan yang pertama di mana permohonan untuk habeas corpus dibuat telah menjadi akademik kerana ia digantikan dengan perintah penahanan pencegahan yang berikutnya, yang kesannya membatalkan kewajipan Perlembagaan Mahkamah Tinggi di bawah perkara 5(2) Perlembagaan Persekutuan ('Perlembagaan'). Situasi kedua ialah dakwaan khusus bahawa penahanan pencegahan telah menjadi akademik berdasarkan fakta bahawa tahanan-tahanan tersebut telah dibebaskan selepas memfailkan permohonan mereka untuk habeas corpus.

Diputuskan, membenarkan rayuan-rayuan:

(1) Berkenaan dengan isu awal, mahkamah bersetuju dengan kes *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759; [2021] 5 CLJ 581 ('Zaidi bin Kanapiah') di mana, berhubung dengan enam rayuan tersebut, fakta bahawa penahanan tersebut dibuat di bawah s 19A APJ dan bukannya s 4(1)(a) APJ tidak menjadikan permohonan tersebut akademik kerana pada tarikh pemfailan permohonan, kesemua enam pemohon tersebut sememangnya ditahan di bawah s 4(1)(a) APJ. Di samping itu, permohonan tersebut secara khusus memohon pembebasan daripada tahanan di bawah peruntukan ss 3, 4 dan mana-mana peruntukan lain APJ. Itu sendiri mewajarkan mahkamah mempersoalkan perkara tersebut memandangkan kewajipan perlembagaan mandatorinya untuk menyemak di bawah perkara 5(2) Perlembagaan. Hakim gagal dalam tugasnya dan terkhilaf dalam undang-undang apabila beliau gagal menjalankan semakan dan membuat keputusan mengenai perkara ini, dengan menganggap bahawa ia adalah akademik. Bagi pemohon-pemohon dalam 19 rayuan tersebut, hakikat bahawa mereka kini bebas daripada tahanan di bawah APJ dan tempoh penahanan yang berkaitan selama enam bulan telah tamat tidak menghalang mereka daripada mencabar keputusan Mahkamah Tinggi berhubung isu tersebut. Isu tersebut kekal 'hidup' semasa rayuan (lihat perenggan 136–138).

(2) 'Recital' APJ hanya merujuk kepada kriteria yang dinyatakan dalam bahagian (a) perkara 149 Perlembagaan dan tidak merujuk kepada bahagian (b)–(f). Di samping itu, setiap behagian telah dipisahkan menggunakan perkataan 'atau' secara jelas yang memerlukan penafsiran bahawa setiap bahagian perlu dibaca secara terpisah. APJ telah digubal menurut perkara 149 Perlembagaan khusus untuk menghentikan tindakan yang menyebabkan sebilangan besar rakyat takut berlakunya keganasan terancang terhadap orang atau harta benda dan bukan mana-mana bahagian lain dalam perkara 149 Perlembagaan. Hakim Mahkamah Tinggi menggunakan kaedah tafsiran berkanun yang salah dan tidak wajar kepada APJ yang digubal menurut peruntukan kecemasan yang terhad dan khas yang dinyatakan dalam perkara 149

Perlembagaan. Ini adalah prinsip yang telah lama diterima bahawa mana-mana kuasa darurat sedemikian yang menyekat kebebasan asasi harus dibaca secara sempit, tegas dan ketat. Oleh itu, mahkamah terpaksa meninggalkan, dan menolak sebahagian daripada keputusan majoriti dalam *Zaidi bin Kanapiah* berkaitan sama ada perjudian dalam talian secara ringkas termasuk dalam bidang kuasa APJ. Mahkamah memutuskan dan menegaskan semula bahawa perjudian dalam talian secara ringkas tidak termasuk dalam bidang kuasa perenggan 5, Bahagian I, Jadual Pertama APJ kerana tiada hubungan antara perjudian dalam talian dan keganasan terancang seperti yang diperuntukkan di bawah APJ (lihat perenggan 158–160, 163, 167, 174 & 182).

(3) Penggunaan perkataan 'orang' dalam perkara 151(1)(a) Perlembagaan dan 'warganegara' dalam perkara 151(1)(b) Perlembagaan adalah disengajakan dan kedua-dua peruntukan tersebut boleh ditafsirkan secara harmoni. Bahagian XI Perlembagaan memperuntukkan secara khusus berkenaan keselamatan negara dan cara menangani ancaman terhadap risiko tersebut. Risiko yang ditimbulkan oleh warganegara dan bukan warganegara mungkin berbeza dan pelbagai. Sehubungan itu, penggubalan undang-undang yang memperlakukan kedua-dua kategori orang tersebut secara berbeza adalah berdasarkan asas yang rasional, iaitu kriteria yang jelas dan boleh difahami, yang memenuhi objektif perkara 149 Perlembagaan. Oleh itu, ketiadaan peruntukan perlindungan tambahan dalam perkara 151(1)(b) Perlembagaan adalah tidak bertentangan dengan perkara 8(1) Perlembagaan. Ini terutamanya kerana asas-asas keadilan semula jadi telah diberikan pengiktirafan dan kesan yang sewajarnya dalam perkara 151(1)(a) Perlembagaan. Atas sebab ini, mahkamah membuat kesimpulan bahawa APJ terpakai kepada kedua-dua warganegara dan bukan warganegara atau warga asing (lihat perenggan 185, 193, 195 & 199).]

Cases referred to

Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors [2006] 3 MLJ 208; [2006] 1 CLJ 977, CA (refd)

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (refd)

Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors [2021] 5 MLJ 474, FC (not folld)

Kanu Sanyal v Dist Magistrate, Darjeeling 1974 AIR 510, SC (refd)

Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841; [2004] 1 CLJ 181, FC (not folld)

L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2018] Supp MLJ 393; [2010] 7 CLJ 653, FC (not folld)

Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)

Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449, FC (folld)
Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors [2006] 1 MLJ 309; [2005] 4 CLJ 613, FC (not folld)
Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2006] 6 MLJ 403, FC (refd)
Onkar Shrian, Re [1970] 1 MLJ 28 (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)
R v Secretary of State for the Home Department, ex parte Khawaja [1982] 2 All ER 523; [1982] 1 WLR 625, CA (refd)
Regina v Secretary of State for the Home Department , ex parte Stafford (1998) 1 WLR 503, CA (refd)
Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs and another [2013] 1 All ER 574; [2012] UKSC 48, SC (refd)
Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 1 MLJ 601; [2020] 1 LNS 1707, FC (refd)
Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia & Ors [2006] 1 MLJ 405, FC (not folld)
Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 1 MLJ 293, SC (folld)
Thomas John Barnado v Mary Ford [1892] AC 326, HL (refd)
Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran [2006] 6 MLJ 689; [2006] 4 CLJ 847, FC (refd)
Union of India v Yumnam Anand (2007) 10 SCC 190, SC (refd)
Vijay Narain Singh v State of Bihar & Ors (1984) 3 SCC 14, SC (refd)
Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759; [2021] 5 CLJ 581, FC (refd)

Legislation referred to

Common Gaming Houses Act 1953
Courts of Judicature Act 1964 s 25, 25(2), Schedule
Criminal Procedure Code s 365, Chapter XXXVI
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(1), 3(2), (3), 6
Federal Constitution arts 4, 5, 5(1), (2), 8, 8(1), 9, 10, 13, 149, 149(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), 151, 151(1), (1)(a), (1)(b), Parts II, XI
Interpretation Acts 1948 and 1967 s 17A
Prevention of Crime Act 1959 ss 3, 3(2), 4, 4(1), 4(1)(a), (1)(b), (2), (2)(a), 6, 10A, 19A, 19A(1), First Schedule, Part 1, para 5

Appeal from: Criminal Application Nos WA-44–220–12 of 2020, WA-44–222–12 of 2020, WA-44–219–12 of 2020, WA-44–221–12 of 2020, WA-44–223–12 of 2020, WA-44–224–12 of 2020, WA-44–79–04 of 2021, WA-44–84–04 of 2021, WA-44–88–04 of 2021, WA-44–85–04 of 2021,

WA-44–92–04 of 2021, WA-44–89–04 of 2021, WA-44–86–04 of 2021, WA-44–90–04 of 2021, WA-44–83–04 of 2021, WA-44–80–04 of 2021, WA-44–93–04 of 2021, WA-44–82–04 of 2021, WA-44–81–04 of 2021, WA-44–91–04 of 2021, WA-44–87–04 of 2021, WA-44–96–04 of 2021, WA-44–95–04 of 2021, WA-44–78–04 of 2021 and WA-44–94–04 of 2021 (High Court, Kuala Lumpur)

Gobind Singh Deo (Mohd Haijan Omar, Loi Yap Loong, Jacky, Tiew Way Keng, Loh Suk Hwa, Marcus Lee, Lim Jin Wen and Ho Cheng En with him) (TY Teh & Partners) for the appellant.

Muhammad bin Sinti (Farah Ezlin bt Yusop Khan, Nur Jihan bt Mohd Azman, Farasyeriza bt Md Zabani and Anasuha Atiqah bt Mat Saidi with him) (Senior Federal Counsel, Legal Advisor's Office, Ministry of Home Affairs) for the respondent.

Nallini Pathmanathan FCJ:

INTRODUCTION

[1] There are two series of cumulative appeals before us relating to preventive detention under the Prevention of Crime Act 1959 ('the POCA') brought by all the appellants, who were detainees at the time of the filing of their applications for habeas corpus and other declaratory relief. The periods of detention have since expired, although all the appellants were in detention at the time of the disposal of their appeals before the High Court.

The High Court

[2] The first set of appeals deals with six cases, while the second set of appeals deals with 19 cases. In both sets of appeals, the appellants were detained under POCA in relation to 'the organisation and implementation of online gambling' which was stated to be in contravention of the provisions of the POCA.

[3] Both sets of cases were heard before two different judges of the High Court of Malaya in Kuala Lumpur. The set of six appeals sought to challenge the remand and detention of the appellants under s 4(1)(a) of the POCA, although the application cited s 4 as well as all the provisions of POCA, and further sought declarations that the arrest and remand of these detainees was unlawful because online gambling did not fall within the purview or scope of POCA. It was further contended that POCA did not apply to foreign nationals.

[4] The set of 19 appeals sought to challenge the detention of the appellants under s 19A of the POCA. It also sought declarations that the detention of

these appellants was unlawful because online gambling did not fall within the purview or scope of POCA. Similarly, it was contended that POCA did not apply to foreign nationals.

[5] It is evident that the primary basis for challenge in both sets of appeals is identical, namely that online gambling does not fall within the purview of POCA and secondly that POCA does not apply to foreign nationals.

[6] In the first set of six appeals, the additional issue of the applications being academic, as the relevant period of remand and detention under s 4(1)(a) of the POCA having expired, was also raised.

[7] At first instance, both judges dismissed all the applications filed by the applicants. The first set of six applications was dismissed on the preliminary point of the applications being academic. Notwithstanding this, the High Court judge went to determine one of the substantive points in issue, namely that POCA does apply to foreign national and not only to Malaysian citizens.

[8] As for the set of 19 applications the other High Court judge similarly dismissed the applications. The issue of the applications being academic did not arise as the applicants were then in detention.

The Federal Court

[9] On appeal, this issue of both sets of appeals being academic, as the relevant periods of detention had expired, was raised before us. This resulted in three identical primary issues being raised before us namely:

(a) by way of a preliminary issue raised by the detaining authority, ie the respondents: whether the appeals as a whole were academic. The rationale behind this being that an application for release or habeas corpus can only be directed at the presently subsisting order of detention. If that detention has expired then the issue becomes academic;

(b) whether online gambling simpliciter falls within the scope of POCA; and

(c) whether POCA applies to non-nationals or foreign nationals or is restricted to Malaysian citizens.

[10] We dealt with both sets of appeals together, namely the set of six appeals, as well as the 19 appeals, because the issues raised were the same. At the end of the hearing, we issued a brief unanimous judgment as follows:

On the preliminary issue of the appeals being academic:

(a) we agree with the decision in *Zaidi bin Kanapiah* that the appeals are not academic because the applications have to be looked at or considered from the date of the filing of the applications for habeas corpus under art 5(2) of the Federal Constitution; secondly it is incumbent upon this court to decide on whether the High Court was correct in deciding as it did. Therefore, there is a live issue here;

(b) the process of detention of the appellants must be looked at as a whole because the entire process is inter-related. If one of the processes is tainted, the entire process is questionable requiring us to look into it.

On the substantive issues

(a) this is our unanimous decision. There remain two issues to be considered namely whether online gambling simpliciter falls within the purview of the Prevention of Crime Act 1959 ('the POCA') and secondly whether POCA applies to non-citizens. We shall deal with the second issue first;

(b) on the second issue, we are not persuaded that POCA is only applicable to citizens. Looking at the scheme of POCA as a whole, coupled with the provisions of the FC in art 151 of the FC, it is our judgment that it applies to both citizens and non-citizens;

(c) on the first issue we are of the view that the recital of POCA is only in respect of art 149(1)(a) of the FC as we interpret it, and it is trite that any restrictive provision of the FC such as the power to promulgate preventive detention dan any such preventive detention legislation, must be read narrowly and restrictively because it encroaches on the provisions of the fundamental liberties as set out in Part II of the FC;

(d) we are therefore of the firm opinion that the recital in POCA does not extend to online gambling simpliciter. There must be a factual basis that involves organised crime as envisaged in art 149(1)(a)of the FC; and

(e) looking at the statement of facts, there is only evidence of gambling online simpliciter. And no element of organised violence. As online gambling is outside the intended scope of POCA, it follows that the detentions are all bad in law. The High Court judges ought to have issued writs of habeas corpus. All the appeals are therefore allowed and the judgments of the High Court set aside. We shall provide full grounds in due course.

[11] We now provide the full grounds for our decision. It is necessary, at the outset to set out the factual matrix pertaining to the arrest and detention of the appellants in both sets of appeals. We deal firstly with the set of six appeals and then the 19 appeals.

THE SET OF SIX APPEALS — APPEAL NOS 05(HC)-38–03 OF 2021(W), 05(HC)-41–03 OF 2021(W), 05(HC)-43–03 OF 2021(W), 05(HC)-42–03 OF 2021(W), 05(HC)-44–03 OF 2021(W) AND 05(HC)-45–03 OF 2021 (W)

[12] The first set of six appeals concern applications by six nationals of the People's Republic of China, seeking orders declaring that their arrest, remand and detention under ss 3, 4 and/or any of the statutory provisions of the Prevention of Crime Act 1959 ('the POCA'), is illegal, on the grounds that such arrest and detention is ultra vires or outside the scope of POCA. The grounds stipulated for their detention is their involvement in the organisation and promotion of unlawful online gambling.

[13] In their applications, the six appellants also sought immediate release from detention, via the remedy of habeas corpus. The respondents named in their applications who are now respondents in the six appeals are:

(a) the police officer who initially arrested the six nationals who is named as the first respondent;

(b) the magistrate who authorised the 'six appellants' remand and detention, who is named as the second respondent;

(c) the Inspector-General of Police, Malaysia named as the third respondent; and

(d) the Government of Malaysia, named as the fourth respondent.

CHRONOLOGY OF SALIENT EVENTS

[14] The six appellants were arrested on 2 November 2020.

[15] The following day, on 3 November 2020, the magistrate (who is the second respondent here) made the initial remand and detention orders pursuant to s 4(1)(a) of the POCA, for a period of 21 days from 3 November–23 November 2020.

[16] On 23 November 2020, the magistrate issued a further remand order under s 4(1)(b) of the POCA for a period of 38 days from 23 November–30 December 2020.

[17] On 8 December 2020, the Prevention of Crime Board ('the Board') made a detention order against the fifth appellant for a duration of six months under s 19A(1) of the POCA.

[18] On 17 December 2020, the Board made similar detention orders

against the *first, second, fourth and sixth appellants respectively for a duration of six months under s 19A(1) of the POCA.*

[19] On 21 December 2020, the Board issued a detention order against the third appellant for a *duration of six months under s 19A(1) of the POCA*.

[20] On 3 December 2020, prior to the issuance of the detention orders by the Board under s 19A(1) of the POCA, the appellants filed their application for habeas corpus and the corresponding declaratory relief as set out in their originating summonses.

[21] The habeas corpus applications came up for hearing on 29 December 2020.

[22] By this date, the Board had issued detention orders against all of the appellants. In other words, *the initial detention of the six appellants under s 4(1) of the POCA had expired and been replaced by detention orders made by the Board pursuant to s 19A(1) of the POCA, against each of the six appellants, for a period of six months.*

[23] However, it is also to be noted that the second extended remand order issued by the magistrate for a period of 38 days remained in force until 30 December 2020.

Preliminary issue before the High Court — The applications for release or habeas corpus are academic

[24] Senior federal counsel ('SFC') acting for the respondents maintained at the hearing of these appeals that the application for, inter alia, the writ of habeas corpus had become academic since the remand order being challenged was no longer in existence. It was submitted by the SFC that the remand order under s 4(1)(a) of the POCA had been replaced with a detention order under s 19A(1) of the POCA which was issued by the Board and not the magistrate. Accordingly, the application, it was contended, was academic.

[25] The High Court allowed the preliminary objection, agreeing with the aforesaid submission, and additionally relying on a series of cases including *Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors* [2006] 3 MLJ 208; [2006] 1 CLJ 977, *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393; [2010] 7 CLJ 653 and *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613 ('Faizal bin Haris').

[26] The last two cases are authority for the proposition that a writ of habeas

corpus must be directed against an existing order of detention as a general rule. Therefore, where a valid detention order is made in respect of a current detention the irregularity or invalidity of any earlier arrest or detention is not amenable to review or the grant of the remedy of habeas corpus.

[27] The High Court then went on to dismiss all the applications for habeas corpus on this ground alone. Although this was the primary basis for the dismissal of the applications, the High Court then went on to consider the second issue of whether POCA applied to non-citizens and concluded that it did. In so concluding, the High Court held, inter alia, that on a perusal of the long title, preamble and the enacting provisions of POCA, read with the assistance of the rationale in the case of *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601; [2020] 1 LNS 1707 that it was clear that the objective of POCA was to prevent crime and control of criminals without limiting its application to just the citizens of Malaysia. The judge went on to hold that it is applicable to all persons arrested under the Act regardless of their nationality.

THE 19 APPEALS — 05(HC)-106–06 OF 2021(W), 05(HC)-107–06 OF 2021(W), 05(HC)-108–06 OF 2021(W), 05(HC)-110–06 OF 2021(W), 05(HC)-109–06 OF 2021(W), 05(HC)-110–06 OF 2021(W), 05(HC)-112–06 OF 2021(W), 05(HC)-113–06 OF 2021(W), 05(HC)-114–06 OF 2021(W), 05(HC)-115–06 OF 2021(W), 05(HC)-116–06 OF 2021(W), 05(HC)-117–06 OF 2021(W), 05(HC)-118–06 OF 2021(W), 05(HC)-119–06 OF 2021(W), 05(HC)-120–06 OF 2021(W), 05(HC)-121–06 OF 2021(W), 05(HC)-122–06 OF 2021(W), 05(HC)-123–06 OF 2021(W) AND 05(HC)-124–06 OF 2021(W)

[28] The second set of 19 appeals pertain to the legality of the detention of 19 persons of the Peoples Republic of China under the provisions of the Prevention of Crime Act 1959 ('the POCA') pursuant to art 5(2) of the Federal Constitution ('the FC') read together with s 25(2) of the Courts of Judicature Act 1964 and Chapter XXXVI of the Criminal Procedure Code. These 19 persons were detained under POCA on the grounds of their involvement in the organisation and promotion of unlawful online gambling.

[29] Soon after the arrest of the appellants, applications for habeas corpus were filed in the High Court on 3 December 2020. By this time, the period of initial remand and detention under s 4 of the POCA had expired and they continued to be detained pursuant to orders issued by the *Prevention of Crime Board ('Board'), pursuant to s 19(A), for a further period of six months.*

[30] The initial application made by the 19 appellants centred on the illegality of their initial arrest and detention under ss 3 and 4 of the POCA. The second application made by the 19 appellants related to the illegality of their detention pursuant to the decision of the Board pursuant to s 10A. The basis for challenging the legality of their detention was that such preventive detention was illegal because:

(a) it was outside the scope of, or ultra vires POCA; and

(b) it had no application to them as they are Chinese nationals.

[31] Having set out the factual matrix underlying all the appeals that were before us on 7 January 2021, we proceed to set out our full reasoning and consideration for the decision we made.

[32] *The first issue that arises for consideration is whether:*

(a) *the application for release or habeas corpus in the six appeals was academic at the point in time when it was heard before the High Court judge, because the initial period of remand and detention of 21 day under s 4(1)(a) of the POCA had expired*; and

(b) *the appeals against the order of the High Court judge in the 19 appeals was academic at the point in time when it was heard on appeal before us, because the period of detention of six months had lapsed.*

THE ACADEMIC POINT IN BOTH SETS OF APPEALS

[33] The starting point to answer this question relates back to the basis for the entitlement of the appellants to seek judicial redress for detention which they claim is unlawful. The foundational basis for such redress is encapsulated in art 5(2) of the FC. It provides:

> 5(2) Where *complaint* is made to a High Court or any judge thereof that a person *is being unlawfully detained* the *court shall inquire* into the complaint and, *unless satisfied* that the *detention is lawful, shall* order him to be *produced before the court and release him.* (Emphasis added.)

[34] Article 5(2) of the FC encapsulates a *constitutional right of review* of the detention which the complainant maintains is unlawful. It encompasses a two-fold duty on the High Court, namely:

(a) it places a duty or legal obligation on the High Court or a High Court judge to inquire into that complaint to ascertain the legality of the detention; and

(b) it requires the High Court or High Court judge to produce the detainee before the court and release the detainee, unless the court is satisfied that the detention is lawful.

[35] But what is the position where the complainant was initially unlawfully detained, but upon expiry of such initial unlawful detention, then subjected to a second period of detention under a separate and seemingly valid.order of detention. Does the fact that the initial unlawful detention has expired, and the existence of a second detention order, preclude the detainee from being heard on the legality of the initial detention under art 5(2) of the FC? Is the detainee then consequentially denied the right of release or habeas corpus?

[36] The detainee claiming unlawful detention generally makes an application seeking release while in detention. The hearing of the application before the court can, however, arise when the period of detention has expired, and been replaced with detention under a different provision of the preventive detention legislation, different legislation, or even when the detainee has been released. Does that mean that the entitlement to have the term of 'unlawful detention' examined by the court no longer subsists? In other words, is the constitutional entitlement of the detainee under art 5(2) of the FC to have the legality of the detention reviewed, eradicated or eliminated, simply by reason of the expiry of the detention?

[37] The scheme of Part II of the FC, more particularly art 5(2) of the FC, would be frustrated and rendered nugatory if a person could be detained for a length of time unlawfully, and he is released just prior to the hearing of his application for habeas corpus, notwithstanding that he filed it during the period that he was detained. In other words, the paramount importance of art 5(2) of the FC and the fundamental safeguard it provides against liberty may be dispensed with by:

(a) treating the several different periods and types of detention order all issued pursuant to a single piece of legislation as comprising separate and discrete silos that are to be considered separately;

(b) utilising the expiry of an order of detention as a groundfor precluding the constitutional right of review under art 5(2) of the FC; and

(c) releasing a detainee early with a view to evading the constitutional right of review under art 5(2) of the FC.

[38] There may well be a series of other situations that may result in the liberty of the detainee, prior to the legality of his detention being examined. The question that arises for consideration is whether the purpose and object of art 5(2) of the FC can be evaded or avoided by the foregoing factors. The answer is a resounding no.

[39] The only reasonable and legally coherent construction to be afforded to art 5(2) of the FC, which construction necessarily incorporates the principle of proportionality as enunciated in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780 (FC), is as follows:

(a) the court, determining this issue is to *examine it from the point in time when the applicant or aggrieved person was in detention under the particular detention order comprising the basis of complaint.* The court is bound to consider the plea for an investigation into the legality of what is said to be an unlawful detention, *from and through the eyes of the complainant, namely the detainee. If the entitlement to review is to be viewed through the lens of the detainee, then the proper point at which the review is undertaken, is at the point in time when the detainee makes the complaint of unlawful detention*; and

(b) *the point of time when the detainee makes the complaint of unlawful detention is fixed or evidenced by the date when he files his application seeking a review and release from such detention.*

[40] To that end, the point of time at which the complainant makes or files the complaint is crucial, as the court is bound to consider whether the detention is unlawful or lawful *at the time when the application for habeas corpus was made.*

[41] It follows that it is incorrect to undertake the review of the detention when the application for habeas corpus is finally heard in court, as a considerable amount of time is likely to have lapsed by that time, and subsequent events may have overtaken the initial remand and detention complained of.

[42] This also means that any subsequent action taken to place the detainee under a new or separate form of detention, or even to release the detainee, does not undermine or stultify the court's express duty to scrutinise the detention with a view to satisfying itself that such detention is indeed legal and valid under the relevant preventive detention laws.

[43] The legal position that the relevant time at which the court undertakes its inquiry into the legality of the detention is at the point of the filing of the complaint by the detainee, is set out comprehensively in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759; [2021] 5 CLJ 581 ('Zaidi bin Kanapiah') at para 54, where the Chief Justice Tengku Maimun bt Tuan Mat held, inter alia, as follows:

> [54] ... The judgments in *Kanu Sanyal* and *Theresa Lim* coherently flow with the line of reasoning adopted by this court in *Ezam.* The foregoing authorities establish the proposition that when a person is detained the legality of his detention is to be

adjudicated by reference to the date the application for a writ of habeas corpus is filed. The detaining authorities are not permitted to 'shift the goal post' — so to speak — by alleging that further or subsequent detentions have been made with a view to render the argument on the impugned detention academic. In other words, the detaining authority cannot rely on subsequent detentions to circumvent the illegality of the initial remand or detention under challenge at the time of filing of the writ of habeas corpus. Accepting such an argument would amount to condoning an abuse of the process of the court and would unduly narrow the interpretation of art 5(2) — a safeguard of a fundamental liberty — against settled constitutional cannons of interpretation. It would also render the safeguard in art 5(2) illusory.

[44] By way of reminder, *Kanu Sanyal v Dist Magistrate, Darjeeling* 1974 AIR 510 ('Kanu') stated as follows:

... It is now well settled that the earliest date with reference to which the legality of the detention challenged in a habeas corpus proceeding may be examined is the date on which the application for habeas corpus is made to the Court. This Court speaking through Wanchoo J (as he then was) said in *AK Gopalan v Government of India* (1966) 2 SCR 427; AIR 1966 SC 816:

> It is well settled that in dealing with the petition for habeas corpus the Court is to see whether the detention on the date on which the application is made to the Court is legal, if nothing more has intervened between the date of the application and the date of hearing.

[45] The case then goes on to consider earlier decisions of the Indian courts where a slightly different view was taken, namely that the relevant date for the purposes of determining the legality of the detention was the time of the return (or the return date). This particular view was stated to be consonant with the law and practice in England and was approved in India. And a third option proffered in another decision of the High Court of India was the date of the hearing before the judge.

[46] In conclusion, however, the Indian Supreme Court held in *Kanu* that the earliest date at which the legality of detention may be examined is the date of filing of the application for habeas corpus and '... the court is not concerned with a date prior to the initiation of the proceedings for a writ of habeas corpus'.

[47] There are therefore three possible scenarios which arise as to when the legality of the detention under art 5(2) of the FC is to be examined:

(a) as of the date when the application for such constitutional review coupled with the remedy of habeas corpus, is made ie the date of the filing of such application;

(b) at the return date of the application; and

(c) at the date of the hearing of the application.

[48] In *Zaidi bin Kanapiah*, the date of filing of the habeas corpus application was held as the earliest defining date for the court to hold its inquiry. This is in keeping with the rationale set out earlier in this judgment, namely that art 5(2) of the FC envisages that the legality of the detention is reviewed by the High Court through the eyes of, or in the shoes of the detainee making the complaint. It then follows that the relevant date is the date when the complaint is made, which, for practical purposes, is to be ascertained from the date of the filing of the application seeking habeas corpus. To that extent, we expressly reaffirm the reasoning and decision arrived at in *Zaidi bin Kanapiah* on the issue of the relevant date to be taken into consideration when reviewing the legality of a detention under art 5(2) of the FC.

[49] This issue of whether the remedy under art 5(2) of the FC is available to an applicant who has been released following the initiation of the application ought also to be dealt with (although not strictly relevant on the present fact scenario). The scheme of our FC envisages that the constitutional right to review of the legality of a detention can only be effectively discharged through an application for habeas corpus. That right accorded under art 5(2) of the FC would be frustrated if a person, after being committed was then detained under a different provision of the same Act, or granted bail or released after the date when the application for such review was made. While the reality in practice is that usually an application for habeas corpus is unlikely to proceed where the detainee has been released since the initiation of the application, it does not follow that his right of review has become extinct. The reality is that the remedy that follows such review has been achieved and therefore the application may not be necessary.

THE DIFFERENCE BETWEEN THE ACADEMIC ISSUE IN THE SIX APPEALS VERSUS THE 19 APPEALS

[50] There is a distinct and specific difference between the matters becoming academic in the first set of six appeals and the second set of 19 appeals.

The academic issue in the six appeals

[51] The issue in the first set of six appeals relates to whether the expiry of the first period of remand and detention pursuant to s 4(1)(a) of the POCA, leaves the High Court bereft of, or without jurisdiction to consider or determine the legality of the continued detention of the six applicants under s 4(2) of the POCA and/or 19A of the POCA. The 'academic' issue here relates to whether a subsequent or succeeding order of detention under a different provision of POCA deprives the High Court of examining the prior order of detention

issued under an earlier or different provision. More specifically the 'academic' issue in this set of six appeals relates to *how succeeding orders for detention under different sections of POCA or any other such preventive legislation are to be treated:*

(a) *discretely or separately, as if they are in silos and wholly disparate and distinct*; or

(b) *as one overarching or all-encompassing detention.*

[52] The answer to this 'academic' point would also encompass a situation where a detainee's detention is halted and he is detained under different preventive legislation to avoid judicial scrutiny under art 5(2) of the FC.

The academic issue in the 19 appeals

[53] The 'academic' issue in the second set of 19 appeals relates to whether the expiry of the detention under POCA for all the appellants, leaves the Federal Court shorn of, or without jurisdiction, as an appellate court, to hear and adjudicate, on the correctness of the decision of the High Court on the legality of the detentions. *This relates to whether a matter which is live and capable of review under art 5(2) of the FC in the High Court, becomes academic on appeal by reason solely of the detainees no longer being in detention.*

[54] It should be emphasised that the issue of the application having become academic takes on a different dimension when the application is considered at first instance by the High Court, and on appeal before this court. This is because art 5(2) of the FC provides for the hearing at first instance before the High Court or a judge of the High Court. Therefore, when a matter is then brought on appeal before the Federal Court it becomes incumbent upon this court to exercise its appellate powers to ascertain whether or not the High Court judge was correct in his reasoning, and as a whole. To that extent the Federal Court judicially scrutinises the appeal from the viewpoint of the High Court judge, meaning specifically, the point in time when the matter was heard before the High Court judge. This therefore makes the issue of the correctness or otherwise of the decision of the High Court a 'live' issue. This rationale is borne out by the reasoning of this court in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449 ('Ezam').

[55] In *Ezam*, Abdul Malek Ahmad FCJ held that the issue of the legality of the detention remained 'live' even when a detainee had been released as of the date of the hearing of the habeas corpus appeal, because that issue remained alive by reason of the finding of the High Court that the detentions were lawful. In other words, the fact that the High Court arrived at a finding of legality on its review, warranted an appellate court to undertake a consideration of the High Court's finding to ascertain whether the scrutiny or review was correct.

The right of appeal of either a detainee or the relevant authority would be rendered nugatory if that were not the case. Equally the correctness of the decision of the High Court could not be ascertained or rectified, if necessary.

'Academic' issue goes to jurisdiction in both instances

[56] However, in both sets of appeals, the academic issue relates directly to the jurisdiction of the relevant courts. Jurisdiction comes into play because in the first case the contention is that as the first detention order has lapsed, the detainee being held under some other provision for detention, the jurisdiction to examine the first detention no longer subsists. And that, the legal argument goes, is because the fact of physical detention under the first detention is no longer in existence. As the jurisdiction to issue the remedy, it is argued, is premised on the fact of such physical detention, the expiry or absence of such physical detention, deprives the court of its jurisdiction.

[57] In the second case the contention is that as the detainee is no longer in detention or has been released when the appeals are heard, the jurisdiction to examine the detention no longer subsists. Again, the basis is that the physical detention having 'expired' or 'lapsed' the court has no jurisdiction to confer the remedy of habeas corpus. And that in turn is based on the rationale that the court's jurisdiction to confer the remedy is predicated on the fact of physical detention.

[58] However, both instances of the 'academic' issue are predicated on the basis that the entitlement of the detainee to have the detention scrutinised, turns on the subsistence of physical detention of the detainee. In other words, it is contended that the right of the High Court to grant the remedy of habeas corpus or release is predicated on the physical fact of detention. Equally it is suggested that the Federal Court's jurisdiction to adjudicate on the correctnes of the High Court's review is similarly predicated on the fact of continuing physical detention.

[59] The issue for consideration is whether that legal premise is correct.

The academic point in Zaidi bin Kanapiah

[60] In *Zaidi bin Kanapiah*, the Chief Justice Tengku Maimun bt Tuan Mat, whose judgment on this point represents the view of the court as a whole, held conclusively that the case of *Ezam* represents the correct position in law and ought to be followed rather than *Faizal bin Haris*, *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393; [2010] 7 CLJ 653 ('Rajanderan') and other cases such as *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 181

('Nasharuddin Nasir') and *Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403. The Chief Justice went on to specifically hold that any other related decisions which departed from *Ezam* are no longer good law, and cannot be relied upon for the academic point raised by the respondents. This aspect of the decision is therefore binding on all lower courts in accordance with the doctrine of stare decisis.

[61] Notwithstanding the clear explanation and acceptance of *Ezam* as representing the correct position in law, and the rejection of *Faizal bin Haris* and *Rajanderan*, (both decisions of this court subsequent to *Ezam*, by a three-member bench) another three member coram of this court in the case of *Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors* [2021] 5 MLJ 474 ('Goh') held by a majority of 2:1, that the challenge by the detainees was in point of fact academic, thereby failing to give effect to the recent majority decision in *Zaidi bin Kanapiah.*

[62] The majority held that the reasoning in *Zaidi bin Kanapiah* is incorrect. The minority maintained that the decision on the academic point was correct and prevailed.

[63] It is of importance to note that the factual matrix and legal issues in *Goh* are identical to the issues in *Zaidi bin Kanapiah* and the present series of appeals. Until the present decision therefore, there were the conflicting decisions of this court in *Zaidi bin Kanapiah* where a coram of four out of five judges expressly held that the decision in *Ezam* reflects the correct legal position and reasoning, on the academic point, versus the decision of the majority in *Goh*, comprising two judges out of three, who maintain that *Ezam* and thereby *Zaidi bin Kanapiah* are flawed in their reasoning and that the reasoning in *Faizal bin Haris*, *Nasharuddin* and *Rajanderan* is preferable (the fifth judge in *Zaidi bin Kanapiah,* while agreeing that the point was not academic did not expressly concur with the other four judges, maintaining that it was 'in the interests of justice' to hear the appeals).

[64] It therefore behoves us to examine the legal reasoning in these two parallel lines of cases to determine which line of cases is in point of fact correct. That therefore brings us to a consideration of the reasoning in *Goh* as well as *Zaidi bin Kanapiah.* It should be stressed that in all these cases the factual matrix is such that at the time of the filing of the writ of habeas corpus, the detainees were all in remand under s 4(1)(a) of the POCA and by the time the applications were heard in the High Court, such detention had expired, to be replaced by a period of detention under s 4(2)(a) for a period of 38 days.

The majority decision in Goh

[65] The majority decision in *Goh* maintains that '… a writ of habeas corpus is only available to a person who is being physically detained unlawfully' relying on the old English case of *Thomas John Barnado v Mary Ford* [1892] AC 326 ('Barnado v Ford'). It goes on to stipulate that '… in an application for a writ of habeas corpus, the remedy is for the release of the persons unlawfully detained and nothing else. Where a person is no longer 'detained' (ie he has already been released under that particular detention order), there is no issue of the writ of habeas corpus to be issued, as there is no 'authority' or 'body' that detained him any longer. His release is therefore no longer in issue. A writ of habeas corpus has to be addressed to the person or authority having actual physical custody of the person alleged to be detained illegally. It is used primarily to secure the release of a person detained unlawfully or without legal justification. The court does not have jurisdiction to determine the matter if a person is no longer detained …'.

[66] The case of *Re Onkar Shrian* [1970] 1 MLJ 28 ('Onkar Shrian') was relied on, where the court held that:

> … The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in habeas corpus.

[67] This ratio was utilised and echoed in subsequent case-law like *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 181 where Steve Shim (then CJ (Sabah and Sarawak)) copied and endorsed this legal premise by holding that:

> It is trite law that the remedy of habeas corpus is intended to facilitate the release of persons actually detained in unlawful custody. It is the fact of detention which gives the court its jurisdiction.

[68] It should be noted here that whereas *Onkar Shrian* specified that it was the illegal detention that was the basis of jurisdiction in an application for habeas corpus, the decision in *Nasharuddin Nasir* went further to restrict the availability of the remedy only to situations where the complainant is in actual physical detention. The original criterion of the need to examine the legality of the suspension was altered, changed or varied somewhat, such that in order to invoke the remedy the fact of physical detention was a necessary element. Without such physical detention, the court no longer possessed the relevant jurisdiction to grant the relief, according to *Nasharuddin Nasir*.

[69] The reliance on *Onkar Shrian* is, with respect, correct in that the decision accurately recognises that it is the legality of the detention which gives the court the jurisdiction to grant the relief, whereas *Nasharuddin Nasir* alters the basis for the grant of the relief by stipulating that the physical detention is the basis for the jurisdiction of the court to grant the remedy. This legal

contention does not take into consideration or address the fundamental basis for the grant of the remedy, namely art 5(2) of the FC.

[70] This legal reasoning was followed by Abdul Hamid Mohammad FCJ (as he then was, and later Chief Justice) in *Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia & Ors* [2006] 1 MLJ 405 ('Sejahratul Dursina') where the learned judge agreed with the views expressed by Steve Shim FCJ in *Nasharuddin Nasir,* echoing the point as follows:

> ... [15] Under both provisions (s 365 of the CPC and art 5(2) of the FC) only one remedy is provided ie to set the detainee at liberty or to release him which actually means the same thing. Indeed, that is what habeas corpus is about: to release a person who is being detained 'illegally or improperly', to quote the words of s 365(a)(ii) of the CPC. The person must be under detention. Only then can he be released if the detention is found to be illegal or improper.

[71] While this summarisation is, with the greatest of respect, correct, there was a failure to recognise that *Nasharuddin Nasir* shifted the basis of jurisdiction from the court undertaking a review of the legality of the detention, to jurisdiction stemming solely from the fact of physical detention. This shift in defining how the jurisdiction of the court was derived, effectively made physical detention a necessary element, in order for the remedy of release from unlawful detention to be granted by a court.

[72] It is immediately evident from this line of cases (as well as *Faizal bin Haris*, *Rajanderan*, *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran* [2006] 6 MLJ 689; [2006] 4 CLJ 847 ('Arasa Kumaran'), all decisions of Augustine Paul FCJ (as he then was) that the entire thrust of judicial scrutiny, was on the need for the physical detention of the person in order to obtain the relief or remedy to be afforded, namely habeas corpus, placing the review of the lawfulness, or legality of, the detention to a secondary or subordinate position. *The core of the court's reasoning in this line of cases was entirely focused on the physical custody of the detainee with the authorities so as to enable the remedy of habeas corpus to be granted, rather than on the legality of the detention. This was so, to the extent that even the jurisdiction founding the basis for the grant of the remedy was said to be predicated on the fact of a subsisting or existing detention.*

[73] The net result of such legal reasoning is that once the physical custody of the detainee ceases, or changes hands, the remedy of release or habeas corpus is simply not available. And equally, if the detention is replaced by another form of detention, reflecting a different stage of the preventive detention process, then too, the remedy of release or habeas corpus vanishes.

The English common law writ of habeas corpus

[74] Such a line of reasoning may well be in line with the age-old English remedy of habeas corpus or the great writ of habeas corpus in its earliest forms, which traces its existence from the days of Magna Carta and is a creature of the common law. However, that age-old remedy of habeas corpus has evolved rapidly to meet modern requirements, such that it is today, no longer simply a procedural device, but is a hybrid of judicial review coupled with the right of release (see *R v Secretary of State for the Home Department, ex parte Khawaja* [1982] 2 All ER 523; [1982] 1 WLR 625).

Article 5(2) of the FC, the Courts of Judicature Act 1964, and the remedy of habeas corpus in this jurisdiction

[75] In this jurisdiction, art 5(2) of the FC makes express and mandatory provision for a court to inquire into a complaint of unlawful detention. As stated above, it then becomes incumbent upon the court to undertake an inquiry to satisfy itself that the detention is lawful. It is only if such satisfaction is met that the detention continues. Otherwise, the unlawfully detained person must be released.

[76] It is therefore immediately apparent that the thrust of art 5(2) of the FC is the right and entitlement to have a full enquiry into the detention claimed to be unlawful. The remedy of release which we commonly refer to as *habeas corpus, is a consequence or remedy consequent upon an inquiry mandatorily required under art 5(2) of the FC, and only so available if the detention is found to be unlawful. The jurisdiction of the High Court to grant a remedy of release or habeas corpus is therefore derived from art 5(2) of the FC.*

[77] In other words, it is not possible to avail oneself of the remedy of *habeas corpus* in vacuo, without recourse to art 5(2) of the FC. The remedy of habeas corpus is available by reason of the additional powers of the High Court specified in Schedule, s 25 of the Courts of Judicature Act 1964 ('the CJA'). Section 365 of the Criminal Procedure Code *is another statutory provision which assists or aids, but it is* art 5(2) of the FC *that confers the foundational constitutional jurisdiction of review and remedy, namely the entitlement to review the legality of the detention and the remedy of release.* These provisions prevail over the English common law remedy. The English common law remedy of habeas corpus should not be invoked in support of an application for release from such detention, as we have art 5(2) and the CJA.

[78] It is therefore imperative that the *different jurisdictional bases* for the remedy of release from detention pursuant to an application founded on art 5(2) of the FC on the one hand, and the separate remedy of habeas corpus under the English common law are fully appreciated, and that such concepts are kept separate when applying the law in this jurisdiction.

[79] At the risk of repetition, we say the right to challenge an unlawful detention and obtain an order of release in this jurisdiction is constitutionally protected under art 5(2) of the FC, and cannot be viewed as equivalent to the common law-based remedy of habeas corpus, whether in its original or present form utilised in that jurisdiction. The existence of statutes affording protection in the form of habeas corpus in other jurisdictions is equally of no binding application in this jurisdiction, which is governed by the FC and other lesser statutes, such as s 365 of the Criminal Procedure Code.

[80] It follows that it is legally incorrect to state that the jurisdiction of the High Court to issue a writ of habeas corpus or release, stems from the fact of detention or the continued physical custody of the person. To maintain that a writ of habeas corpus only issues if continued physical custody is present, and that such continued physical custody can only exist where there is a current order of detention in existence is, with great respect, a flawed understanding of the law relating to unlawful detention and release, or the law of habeas corpus. The correct legal position is that the actual physical custody of the detainee under a subsisting detention order only, is *not* a pre-condition to the grant of the remedy of release under art 5(2) of the FC. It is however *generally* necessary that the detainee seeking release is in detention at the time when the application for release or habeas corpus is sought vide an application to the High Court.

[81] The question that then follows is this: If the issuance of an order of release or habeas corpus is not predicated upon the fact of continuing physical custody of the detainee under a subsisting detention order only (as postulated by our courts in several decisions including *Nasharuddin* and *Sejahratul Dursina*, *Faizal bin Haris*, *Rajanderan* and *Arasa Kumaran*) but on art 5(2) of the FC, can it then be categorically concluded that in the absence of actual physical detention under a subsisting order of detention, the remedy of release is barred or prohibited?

[82] Put another way, if a person who is unlawfully detained seeks to challenge his detention and applies under art 5(2) of the FC for a writ of habeas corpus or release, and is then subsequently released or placed under some other form of detention (which appears prima facie to be valid), is his constitutional right to have the 'unlawful' detention removed, usurped or truncated? Is the constitutionally guaranteed process extinguished, if the applicant for habeas corpus is discharged by the relevant authority *after* the application for habeas corpus has been filed and submitted for the court's consideration?

[83] The answer is obviously no, if art 5(2) of the FC is given full and substantive effect.

[84] If indeed the remedy afforded art 5(2) of the FC is refused on the basis that the detention order pursuant to which the application was made, has been replaced with some other detention order, or that the detainee has since been discharged, the scheme of Part II of the FC, more particularly art 5(2) of the FC, would be frustrated, as a person could be detained for a length of time unlawfully, and released just prior to the hearing of his application for habeas corpus, notwithstanding that he filed it during the period that he was detained, as explained earlier on.

[85] The failure to give full effect or even consider art 5(2) of the FC fully, is evident, with the greatest of respect, in the cases of *Nasharuddin*, *Faizal bin Haris*, *Rajanderan* and *Arasa Kumaran*. In point of fact these cases effectively abrogate this constitutional right enshrined in art 5(2) of the FC.

[86] We have made reference at the outset of this judgment relating to the academic issue, that the High Court is bound to perform its constitutional duty of review under art 5(2) of the FC, by considering the legality of the detention at the point of filing of the application for release. It is a point worth reiterating here, because it provides alternative and substantive legal reasoning to support the conclusion that the substitution of another order of detention under s 4(2) of the POCA as well as s 19A of the POCA cannot deprive the detainee of his entitlement to have his review heard on its merits.

[87] The full and proper construction to be afforded to art 5(2) of the FC is that the court looks at the application as if it were a s 4(1) of the POCA detention, and if such detention is tainted, then it follows that any other detention ensuing from it, must be similarly tainted, because they both stem from the same series of transactions under the same legislation, namely POCA. The fact that the initial remand and detention was tainted, cannot be ignored or swept under the carpet, allowing for continued detention under separate but related provisions of POCA.

[88] This is evident from a perusal and construction of POCA in its entirety, where it may be noted that itcomprises a series of mandatory or imperative provisions which have to be complied with prior to proceeding on to the subsequent bases for such preventive detention. The sections are all predicated on each other, such that it is not possible to read each section as comprising a complete and entire basis for the initial or continued detention of the detainees.

[89] In short, POCA is not legislation providing for a series of truncated detentions. Each segment of the detention under POCA is related to the former. The net consequence is that any subsequent action taken to place the detainee under a new or separate form of detention, or even to release the

detainee, does not undermine or stultify the court's express duty to scrutinise the earlier detention with a view to satisfying itself that such earlier detention is indeed legal and valid under the relevant preventive detention laws.

[90] *To that end, the relevant question to be asked therefore, is whether the applicant was in detention at the point of time when the application was filed.*

[91] That is the purport of the decision in *Zaidi bin Kanapiah,* as explained and reaffirmed above. Reliance in that case was placed on *Ezam,* where the thrust or heart of Malek Ahmad FCJ's legal reasoning was that the issue of whether or not the detention is unlawful remains a live issue even at the appellate level, because the judge had undertaken a review of the same in the High Court. The Federal Court was therefore entitled to examine the High Court decision, at which point in time the detainees or most of them were still in physical detention.

[92] Turning back to *Goh,* with respect, it is evident that the court there failed to give effect to art 5(2) of the FC as it failed to examine the issue of the legality of the detention under s 4(1)(a) on the grounds that such detention had 'expired'. Such a construction results in the fundamental purpose and object of art 5(2) of the FC being stultified and rendered nugatory. An unintended delay in the hearing of a habeas corpus application would then determine the fate of the detainee, notwithstanding his constitutional rights entrenched in art 5(2) of the FC. In *Goh,* this court sought to reject *Ezam* and re-assert the legal position in *Faizal bin Haris*, *Rajanderan* and *Arasa Kumaran* as representing the correct legal position, despite the clear rejection of the same as no longer being good law in *Zaidi bin Kanapiah,* a decision of the same court handed down a month prior to *Goh.*

Faizal bin Haris

[93] Given the heavy reliance on the case of *Faizal bin Haris* in *Goh,* a consideration of that decision is necessary. *Faizal bin Haris* was relied on to support the conclusion that the fact that the detainee is detained under another provision of the same preventive detention legislation, renders the application 'academic', because the relevant period under the first detention has expired.

[94] *Faizal bin Haris is authority for the proposition that any application for habeas corpus can only, and must only be made in respect of a current and subsisting detention order, and no other.* This means in effect that an application for *habeas corpus can only be considered or allowed by a court where there is a subsisting detention order and the detainee is currently within the physical custody of the relevant authority under the subsisting detention order.*

[95] In *Faizal bin Haris,* Augustine Paul FCJ sought to resolve the legal question of whether irregularities in a prior detention order vitiate a subsequent regular detention order issued by way of preventive detention. The preventive detention legislation in that case was the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the DDSPMA'). There, the initial arrest and detention was fraught with irregularities. This was accepted, and Augustine Paul FCJ stated as follows:

> ... *This raises the question of whether the irregularities vitiate the subsequent regular detention order issued by the Minister.*

That was the primary issue in the case. The judge then went to state that it is:

> ... *only when the wording of a statute requires a proper arrest as a condition precedent to the making of a subsequent detention order can a person make a valid complaint of the detention. The corollary is that a detention order can be made against a person under s 6(1) even when his detention under s 3(2) was irregular*.

[96] In arriving at this conclusion, Augustine Paul FCJ relied, inter alia, on the textbook by RJ Sharpe entitled *The Law of Habeas Corpus* (2nd Ed), more particularly the excerpt at pp 180–181 of the book. It is necessary to read the passage in Sharpe with care. This is because the entire passage in the textbook relied upon in *Faizal bin Haris,* deals with the application for habeas corpus in the context of an arrest preceding *ordinary criminal proceedings,* where there is a formal charge preferred against the accused, which is to be followed by a full and fair trial. It does not contemplate, nor make any reference to preventive detention where there is no such opportunity afforded to a detainee, save as provided for in the legislation.

[97] The point to be appreciated is that in the context of an arrest and detention as envisaged in Sharpe's textbook, the detainee, in effect the accused, who was illegally arrested, is detained pending a full criminal trial, where he is at liberty to present his defence, and is entitled to an open trial with all the necessary safeguards of the criminal justice system at the detainee's or accused's behest. Not so in the present set of appeals, nor those in *Zaidi bin Kanapiah* or *Goh,* where the relevant legislation is preventive legislation and where there is no prospect of an open criminal trial at all.

[98] In the former circumstance, namely the context in the passage from Sharpe relied upon in *Faizal bin Haris, the arrest can be clinically or surgically excised,* as it were, from the rest of the trial, because the detainee or accused person proceeds with a full trial. Whereas the detainee detained under preventive detention legislation is not afforded such an opportunity. In such a circumstance, is it correct to seek to 'surgically' excise the arrest and detention under s 3 which is fundamentally flawed, from the subsequent order of detention made by the Minister under s 6 of the DDSMPA, the same Act?

Does the said legislation envisage such clinical excision, leaving the detainee shorn of such limited safeguards as subsist in the legislation? A

[99] A reading of the express provisions of the said legislation answers the question in the negative. The issue in *Faizal bin Haris* was whether the irregularities in s 3(2) of the DDMSPA could affect the issuance of the detention order by the Minister under s 6 of the DDMSPA. B

[100] Section 3(1) and 3(2) of the DDMSPA expressly prescribe how and in what circumstances a person may be arrested without a warrant and detained. The proviso to s 3(2) sets out the various statutory safeguards that subsist to ensure that the right of any police officer to arrest and detain without a warrant is not abused. Definitive stages of the detention require the supervision and scrutiny of a senior police officer of escalating seniority as the period of detention increases. C D

[101] Section 3(3) then specifies that the police officer making an investigation 'pertaining to a person arrested and detained under this section' shall cause a copy of the complete report of the investigation to be submitted, inter alia, to the Minister. It is therefore clear that the report of the police officer making the investigation pertains to a person who has been arrested and detained in accordance with the earlier provisions, namely s 3(1) and 3(2). In other words, it is envisaged in the DDSMPA that the person arrested and detained must be so detained in accordance with the modes of arrest and detention specified in s 3(1) and (2). This report goes to the Minister, who is then able to ascertain whether, in point of fact, the arrest for preventive detention is in accordance with the Act. E F

[102] And s 6 of the DDSMPA provides that the subjective satisfaction of the Minister is only arrived at after considering, inter alia, a complete report of investigation submitted under sub-s (3) of s 3, In other words, the s 3(3) report which relates back to the mode of arrest and detention as prescribed in s 3(1) and (2) is relevant and significant material that the Minister is statutorily bound to consider before deciding whether he is satisfied that a detention order should ensue. G H

[103] If it is said that the statutory requirements as set out in s 3(1) and 3(2) of the DDSMPA can be surgically excised from s 6, it would mean that the Minister would have to ignore all deficiencies in the report submitted under s 3(3), which report comprises an essential part of the basis for his subjective satisfaction. And the report in s 3(3) of the DDSMPA is inextricably linked to s 3(1) and (2) of the DDSMPA. I

[104] However, Augustine Paul FCJ held on the contrary, that the detention

order issued by the Minister under s 6 of the DDSMPA was disparate and could be completely excised from the arrest and detention effected under s 3(1) and (2) of the DDSMPA. In other words, the various sections in the DDSMPA were to be read disjunctively and disparately, as if each section is in its own silo. Accordingly, it was in order for deficiencies in the arrest procedure to be ignored, as that could not 'taint' or affect the issuance of the detention order by the Minister pursuant to s 6 of the DDSMPA. This, with the greatest of respect, does not allow for a harmonious interpretation of the law.

[105] Further, in so holding, the learned judge was importing the law generally applied in relation to ordinary criminal proceedings, namely that the illegality of an arrest in relation to the accused, will not taint the criminal trial which ensues. That is indeed tenable where the accused is constitutionally entitled to a full and fair trial under art 5(1) of the FC. But can that same line of legal reasoning apply to preventive detention legislation where the mode and manner of arrest is an integral part of the entire process leading up to a lengthy period of detention with no trial? Again the answer must be no.

[106] The learned judge, by so reasoning and concluding committed, with the greatest of respect, a fundamental error in equating:

(a) the irrelevance of irregularities of arrests in the course of ordinary criminal proceedings; with

(b) irregularities or non-compliance with statutorily prescribed arrest and detention procedures under the DDSMPA, which is preventive detention legislation.

[107] Such statutory prescriptions in relation to arrest and detention, subsist to ensure that there is no abuse of the preventive detention law. As such, these provisions do, in fact, amount to the equivalent of a condition precedent in a statute requiring the validity and integrity of an arrest to be attained, prior to issuance of the formal order of detention under the statute.

[108] Preventive detention law in itself eliminates most of the safeguards available to persons prosecuted under the general criminal justice system. Such safeguards that do subsist are expressly provided for in the relevant legislation itself, art 149 of the FC as well as art 151 of the FC. If even these statutorily prescribed safeguards are removed, persons so detained will be deprived of even the most basic protection in defending themselves against such preventive detention legislation.

[109] These issues were, with the greatest of respect, not considered in *Goh* notwithstanding that the issue there was whether *Ezam* or *Faizal Hails* was correct in its legal reasoning. The excerpt from Sharpe and its application to

substantiate the excision of s 3 from s 6 so as to preserve and protect the detention order issued by the Minister was, with respect, not analysed.

The scope and ambit of the remedy of release or habeas corpus under art 5(2) of the FC

[110] Further on in the judgment of *Faizal bin Haris,* Augustine Paul FCJ then went on to state:

> The general rule that a writ of habeas corpus must be directed against the current order of detention therefore applies where the detention under s 6(1) has been made subsequent to an arrest and detention under s 3(1) and (2). It follows that where a detention order has been made under s 6(1) the writ of habeas corpus must be directed only against that order even if the earlier arrest and detention is irregular. This view is supported by *Thomas John Barnado v Mary Ford* [1892] AC 326 where Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parts with the custody of another.

[111] The legal proposition made here is that an application for habeas corpus can only be directed against a presently subsisting order of detention, such that once an order under s 6 of the DDSMPA is pronounced, any application for release or habeas corpus from detention by reason of deficiencies or non-compliance under s 3(1) and (2) of the DDSMPA, stand extinguished. The entitlement of a complainant to have the legality of his detention under those provisions examined by the courts is lost. This in effect means that a detaining authority is at liberty to halt the detention under a particular provision and issue a further order under a different provision of the same legislation to avoid any scrutiny of the deficiencies or irregularities in the earlier detention.

[112] Such a legal stance is at odds with the rationale that has been put forward earlier on in *Ezam*, *Zaidi bin Kanapiah* and this judgment. As stated earlier on in this judgment, in every habeas corpus application challenging detention, the inquiry by the court focuses on the application as of the date of filing of the same. As long as the person was in detention at that point in time, the inquiry may proceed. But in *Faizal bin Haris* that entitlement is effectively removed. For the reasons set out earlier this is not a tenable proposition.

[113] The rationale for this legal proposition in *Faizal bin Haris* was stated to be founded on the case of *Barnado v Ford.* Reliance was placed on a statement of Lord Halsbury in so concluding. However, a full reading of the case discloses that what Lord Halsbury was disapproving of, was the use of the writ of habeas corpus to punish a person who had previously wrongfully detained, but was

not, at the point of issuance of the application for habeas corpus, detaining him. Instead, he stressed that the remedy was primarily, if not solely to obtain the production of the person who was wrongfully detained. No element of punishment ought to be introduced into the remedy. And Lord Halsbury made this statement because the Court of Appeal in another case at the time had made the proposition that it was possible to issue the writ to punish the person who had wrongfully detained a person.

[114] In allowing for the writ to issue Lord Halsbury stated, inter alia, as follows:

> ... I cannot acquiesce in the view that some of the learned judges below seem to have entertained, that if a Court is satisfied that *illegal detention has ceased before application for the writ has been made,* nevertheless the writ might issue *in order to vindicate the authority of the court against a person who has once. though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another* ... I think under such circumstances, the writ ought not to issue at all, *as it is not the appropriate procedure for punishing such conduct.*

[115] Here it is evident that reference was being made to release from an unlawful or illegal detention *prior to, or before the writ of habeas corpus has even been applied for.* In other words, the person was not in the detention of the person against whom the remedy is sought, at the point in time when the application was made.

[116] This accords entirely with what has been stated previously in this judgment and in *Zaidi bin Kanapiah.* In *Zaidi bin Kanapiah* it was stated that the application for habeas corpus must be viewed as of the date of the filing of the application for release under art 5(2) of the FC or habeas corpus. That means the date when the application for release was made. So, as long as the person is in the detention of a particular authority at the time when the application was made, the application may be heard and the writ issued. The remedy is generally not available when the person was not even in the detention of the person or authority against whom he remedy is sought, as of the date of the application for the writ.

[117] In the case of *Faizal bin Haris,* and the present series of appeals, when the applications for habeas corpus were made or filed, the appellants were all under detention which they claimed to be unlawful. By the time the applications were heard, their detentions were under different sections of the same preventive detention, for example s 6 of the DDSMPA rather than s 3 of the DDSMPA in *Faizal bin Haris*, and similarly in these appeals under POCA. Therefore, on an application of Lord Halsbury's statement, it is apparent that the detainees in *Faizal bin Haris* and the present appeals were all still in detention under the same preventive legislation at the point in time when the

applications for habeas corpus were made. They were not free from detention at the point in time when the applications were made, as envisaged by Lord Halsbury in *Barnado v Ford.*

[118] In short, the fact of physical custody and detention at the point of the hearing of the application is not a necessity in order for a court to grant the remedy. As stated earlier, the practice is that often where the detainee is in point of fact free from any form of detention, the application is withdrawn. However, where detention changes from one part of restraining authority to another it can hardly be said that the person is no longer in preventive detention anymore. To that extent the distinction made in *Faizal bin Haris* is, with the greatest of respect, artificial and is not borne out by either the passages in Sharpe nor the case of *Barnado v Ford.*

[119] The proposition that physical custody and subsisting detention is the basis for the jurisdiction of the court to issue habeas corpus is incorrect. As pointed out above, the position in this jurisdiction is governed by art 5(2) of the FC. However, even in the United Kingdom, the writ of habeas corpus allows for the issuance of the writ even where the detaining authority may not be able to immediately deliver up custody of the person.

[120] This is borne out by the English case of *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs and another* [2013] 1 All ER 574; [2012] UKSC 48 where the Supreme Court of the United Kingdom considered the issue of control in habeas corpus and held, inter alia, as follows:

> Control
>
> 45. At the heart of the cases on control in habeas corpus proceedings lies the notion that the person to whom the writ is directed has either actual control of the custody of the applicant or at least the reasonable prospect of being able to exert control over his custody or to secure his production to the court. Thus in *Bernardo v Ford* [1892] AC 326 where the respondent to the writ had consistently claimed to have handed the child, who was the subject of the application, over to someone whom he was no longer able to contact t*he courts nevertheless ordered that the writ should issue because they entertained a doubt as to whether he had indeed relinquished custody of the child There was therefore a reasonable prospect that the respondent. despite his claims, either had or could obtain custody of the child.*
>
> 46. And in *R v Secretary of State for Home Affairs, Ex p O'Brien* [1923] 2 KB 361, Bankes LJ, *although he accepted the affidavit evidence of the Home Secretary to the effect that Mr O'Brien was under the control of the governor of Mountjoy prison and that the governor was an official of the Irish Free State not subject to the orders or directions of the Home Secretary or the British government, nevertheless decided that the writ of habeas corpus should issue.* This was because the arrangements which existed between the Irish Free State and the United Kingdom provided grounds for believing that the Home Secretary could obtain the return of Mr O'Brien. Mr O'Brien had been arrested in London under regulation 14B of the Restoration of Order in Ireland

Regulations 1920 and deported to Ireland there to be interned until further order. A statement had been made in the House of Commons on 19 March 1923 that the Irish Free State had given the British government a number of undertakings, one of which was to the effect that if it was decided that any person should not have been deported he would be released. *On this basis, the Court of Appeal in effect held that there was a reasonable prospect that the Home Secretary could exert sufficient control over the custody of Mr O'Brien to justify the issue of the writ. Scrutton and Atkin LJJ agreed with Bankes LJ, Atkin LJ observing that the question was whether control 'exists in fact'. The circumstance that Mr O'Brien was under the control of the governor of the prison was 'by no means inconsistent with an agreement with the Free State Government to return on request'. Although he acknowledged that there was doubt as to whether the Home Secretary could exert control, Atkin LJ held that there was material before the court which suggested that he could, and, on that account, habeas corpus should be granted.* (Of course, the Court of Appeal's apprehension that the Home Secretary did have sufficient control to secure the production of Mr O'Brien proved to be entirely correct for he was brought to the court on 16 May 1923 and was 'thereupon discharged').

47. On appeal to the House of Lords, (*Secretary of State for Home Affairs v O'Brien* [1923] AC 603), the Home Secretary's appeal was dismissed on jurisdictional grounds. Lord Atkinson dissented on that issue but he clearly approved the Court of Appeal's analysis for, in a passage at p 624, which has resonances for the present appeal, he said this:

> *[The writ of habeas corpus] operates with coercive force upon the Home Secretary to compel him to produce in Court the body of the respondent. If the Executive of the Free State adhere to the arrangement made with him he can with its aid discharge the obligation thus placed upon him ...*

[121] It is evident from a reading of the series of cases starting from *Barnado v Ford*, *O'Brien* and *Rahmatullah* that control over the person of the detainee or the ability to exert control to produce the person in court is an important or essential requirement for the grant of the writ of habeas corpus. It does not require actual physical custody or detention to actually subsist, as is suggested in *Faizal bin Haris.* In *Faizal bin Haris* the legal rule laid down is that there must be current and subsisting physical detention of the detainee to enable a writ of habeas corpus be issued. In *Nasharuddin Nasir* that concept was taken further to state that the issuance of the writ depended upon the physical fact of detention as the court derived its jurisdiction from such detention. With the greatest of respect, these conclusions are difficult to defend as being correct.

[122] It is reiterated that the situation is entirely different in relation to the situation in *Faizal bin Haris* and the series of appeals here, where the relevant law is preventive detention and de facto physical custody had simply been passed on to another related detaining authority under the same preventive detention legislation, to whom and with whom the detaining authority summoned, had full access. To therefore conclude that *Barnado v Ford* is to be

read as somehow limiting or restricting the effect of art 5(2) of the FC, simply because detention and control had passed from one arm of the detaining authority to another, and that therefore no habeas corpus could issue is, with the greatest of respect not an entirely correct reading of the said authority.

L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2018] Supp MLJ 393 ('Rajanderan')

[123] In *Goh,* this court then sought to rely on *Rajanderan* which mirrored and adopted the approach in *Faizal bin Haris,* refusing to depart from the same. The same emphasis on the requirement of a subsisting physical detention to warrant the grant of habeas corpus plus the treatment of different sections within the same piece of legislation as comprising disparate detentions was adopted. For the reasons we have outlined at length above, the decision in *Rajanderan* therefore retains the same flaws in coherent legal reasoning as *Faizal bin Haris.*

[124] The construction given to art 5(2) of the FC and the remedy of habeas corpus as enunciated in *Ezam* and affirmed in *Zaidi bin Kanapiah* is therefore the correct approach to adopt. The legal reasoning in *Faizal bin Haris*, *Rajanderan* and *Arasa Kumaran* as well as *Nasharuddin Nasir* and a series of other cases that adopt this reasoning is, with respect, less than accurate for the reasons set out above. It is for this reason that we stated in our brief grounds that *Zaidi bin Kanapiah* overrules the approach in *Faizal bin Haris* and the series of cases emanating therefrom. The analysis here addresses the concerns raised about the accuracy of the reasoning in *Zaidi bin Kanapiah* conclusively by pointing out the flaws/errors in the approach adopted in *Faizal bin Haris* and thereby *Goh. Goh* did not, with the greatest of respect, undertake any independent analysis but adopted *Faizal bin Haris* on the basis that the reasoning there and in *Nasharuddin Nasir* and *Sejahratul Dursina* are correct and *Ezam* is wrong. For the reasons we have articulated here, the approach in *Goh* is therefore fraught with similar infirmities.

[125] At para 101 of *Goh,* the majority decision goes on to stipulate that as the only remedy in an application for a writ of habeas corpus is release of the detainee from the detention, if the detainee is no longer under detention the writ of habeas corpus ought not to issue. We have addressed this issue at length earlier on to point out that if such an approach is adopted then the remedy afforded under art 5(2) of the FC will be rendered nugatory. That is why the application is determined on the basis of the date on which it is filed. So long as the detainee is under detention when the application for habeas corpus is filed, the remedy is available even if detention has changed from detention under one section of the legislation to another simply because the entirety of these provisions are interconnected and interlinked, comprising a series of steps

A taken to culminate in the detention order which preventively detains the detainee for some considerable length of time. That is why the term one overarching transaction is utilised.

B **[126]** In *Goh,* it was sought to explain and make further inferences from the orders of this court in *Ezam.* The concern over the fact that the order released the appellants despite the fact that one had been released is, with respect, unwarranted because the application is dealt with as of the date of the filing of the application for habeas corpus. And this in turn is because the jurisdiction of the court does not originate from the fact of physical custody and detention per C se, but from art 5(2) of the FC. Therefore the criticism against the decision that the issue of the grant of habeas corpus was not academic is unjustified, and not correct.

D **[127]** Similarly as we have explained above the legal reasoning in *Nasharuddin Nasir* suffers from the same infirmity as *Faizal bin Haris,* as the ability to issue a writ of habeas corpus is stated to be entirely dependent on the fact of a continuing physical detention against the detaining authority at the point in time when the application is heard, rather than when it is filed. Further the E court went on to hold that the very jurisdiction of the court is premised on this fact of continued physical detention. It is reiterated that this is flawed for the reasons explained at length earlier, namely that the relevant time at which a court is to consider the issuance of a writ of habeas corpus is that point in time when the writ is applied for, and the detainee is then in detention. Secondly the F jurisdiction of the court to issue the writ of habeas corpus derives not from the fact of physical detention, but from art 5(2) of the FC, in this jurisdiction. The former premise is predicated on the old English writ of habeas corpus stemming from the English common law as it was, at the onset of the remedy. Therefore the case does not represent a correct reflection of the law in this G jurisdiction.

[128] When a detention which is the subject matter of challenge is considered in this context, it follows that as the focus is on the duty of the court to inquire H into the legality of the detention the fact that the de facto custody and detention of the applicant has passed on to a different gaoler or detaining authority, but under the same preventive detention legislation or even other detention, that cannot in itself prohibit the constitutional review from being undertaken by the court. That is why *Zaidi bin Kanapiah* referred to the several I stages of detention under different sections of the same legislation as amounting to one overarching transaction. And this is amply supported by *Ezam* as well as *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293 which represent the more legally coherent legal proposition.

[129] The majority decision in *Goh* also sought to fault the reasoning in *Zaidi bin Kanapiah* (and thereby in this decision) in relation to its holding that the relevant and earliest date for the purposes of ascertaining whether a detention is lawful, warranting the grant of an order of release, is the date of filing of the case. In *Goh,* an attempt was made to reject the reasoning in *Kanu.* Reliance was placed on *Sejahratul Dursina* where it was held that: 'there should not, or could not, be a separation of the date of hearing from the date of the decision. The date fixed for decision forms part of the hearing; the hearing of an application certainly includes the decision thereof'.

[130] Taking this line of reasoning one step further, there should not, nor could not be a separation from the date of application ie the date of the filing of the application for release under art 5(2) of the FC and the date of the hearing or the date of the decision. This would be anomalous. The three are inextricably intertwined and therefore the correct date for consideration should be at the point when the application is made. This is consistent with the reasoning in *Barnado v Ford* and most other authorities, save for *Faizal bin Haris*, *Nasharuddin Nasir*, *Sejahratul Dursina* and the line of cases that followed, and continue to adopt the reasoning there. Again an adoption of any date other than the date of application will result in the entire exercise under art 5(2) of the FC being rendered nugatory in the event the detention ceases, or is transferred. The issue of art 5(2) of the FC being rendered nugatory has not been satisfactorily considered nor answered in any of those cases, including *Goh.*

[131] For the reasons stated above, it is reiterated that the decisions in *Ezam*, *Theresa Lim* and *Zaidi bin Kanapiah* reflect the correct legal reasoning in law. As such the legal reasoning in *Goh*, *Faizal bin Haris*, *Rajanderan*, *Nasharuddin Nasir*, *Sejahtarul Dursina* and the case-law following those cases is flawed, and ought not to be followed.

[132] For the reasons we have set out above, we concluded that the applications for habeas corpus sought in both sets of appeals are *not* academic.

Summary on the 'academic' point

[133] For clarity, we state again that the 'academic' point argued in these appeals actually encompassed two separate situations.

[134] The first situation was premised on the argument that the initial preventive detentions upon.which the applications for habeas corpus were premised had become 'academic' by reason of the fact that they were superseded by subsequent preventive detention orders, effectively abrogating the High Court's constitutional duty under art 5(2) of the FC.

[135] The second situation was the specific allegation that the preventive detentions had become academic by virtue of the fact that the detainees concerned had, after filing their applications for habeas corpus, been released.

[136] We rejected these arguments and in so doing, reaffirmed *Zaidi bin Kanapiah* as representing the correct view on the subject. Without narrowing what has ben reasoned at length above, we summarise our legal findings as follows:

(a) the High Court's constitutional duty to assess the legality of any detention-especially preventive detention-starts from the date of filing of the habeas corpus application assuming that the detainee was, at the time he filed it, under detention. In this assessment, the court must scrutinise the legality of the detention from the lens of the detenu;

(b) the jurisdiction of the High Court or a High Court judge is not determined by the fact of physical detention but the legality of the detention itself assessed from the date of the filing of the application for habeas corpus;

(c) viewed in this way and giving art 5(2) of the FC its fullest effect, the fact that the detenu was, subsequent to the date of the filing of his application, preventively detained by some other authority or under some other provision, legislation or order does not vitiate his right to judicial scrutiny over the legality of his initial detention;

(d) similarly, the fact that the detenu is released after the date the application is filed, but before the return or hearing date, does not affect the jurisdiction of the court to review the legality of the detention which is under challenge; and

(e) finally the fact that the detenu is under detention during the hearing but released after an appeal to the Federal Court is filed, does not render the application 'academic'. The live issue before the Federal Court is no longer simply the detention but the correctness of the decision of the High Court as assessed from the lens of the High Court judge.

[137] More specifically in relation to the set of six appeals, the fact that the detention was one under s 19A of the POCA rather than s 4(1)(a) of the POCA did not render the applications academic as at the date of the filing of the application the six applicants were indeed detained under s 4(1)(a) of the POCA. Moreover, the application specifically seeks release from detention under the provisions of ss 3, 4 and any other provisions of the POCA. That in itself warrants the court inquiring into the matter in view of its mandatory constitutional duty of review under art 5(2) of the FC. The judge failed in his duty and erred in law when he failed to undertake the review and make a decision on this point, holding that it was academic.

[138] With respect to the 19 applicants in the second set of appeals, again the fact that they are now free from detention under POCA, the relevant period of detention of six months having expired, in no way precludes them from challenging the decision of the High Court on the issue. As explained at length above, the issue remains 'live' on appeal.

[139] We therefore went on to hear the appeals on their merits.

ISSUE 2: DOES ONLINE GAMBLING SIMPLICITER FALL WITHIN THE AMBIT OF POCA AND ART 149 OF THE FC?

[140] All the appellants in these two sets of appeals were detained for the reason that they were concerned with the organisation and management of online gambling, which the respondents maintain, fall within the purview of item 5 of the First Schedule to the POCA 1959.

[141] In the High Court the appellants in the second set of 19 appeals (as the first set of six appeals was disposed of on the preliminary point) maintained that online gambling simpliciter does not fall within the purview of POCA.

[142] More specifically the submission was that POCA only refers to limb (1)(a) of art 149 of the FC and therefore does not encompass limb (1)(f) of art 149 of the FC. As such, any application of POCA is restricted to limb (1)(a) of art 149 of the FC which deals primarily with causing, or causing a substantial number of citizens to fear 'organised violence against persons or property'. It was submitted that the management and organisation of online gambling simpliciter does not fall within this limb, particularly as there is no factual allegation or basis to support the requirement of organised violence against persons or property.

[143] The High Court judge dismissed this contention holding, inter alia, that:

(a) a purposive reading of POCA as a whole, including the object and intent that Act, meant that its overall objective was to prevent any action as described in art 149(1)(a)–(f) of the FC. In short the High Court read the entirety of art 149 of the FC as being incorporated in POCA by reason of its preamble and short title;

(b) accordingly, the High Court judge went on to contemplate only whether online gambling simpliciter fell within the purview of art 149(1)(f), namely whether it was 'prejudicial to public order in, or the security of, the Federation or any part thereof'; and

(c) the High Court judge further relied on the judgment of the majority in *Zaidi bin Kanapiah* on this point to conclude that he was bound by stare

A decisis to hold that online gambling simpliciter fell within the purview of limb (1)(a) of art 149 of the FC.

[144] As stated at the outset, we held in the instant appeals that online gambling simpliciter does not fall within the purview of limb (1)(a) of art 149 of the FC. The two primary issues that fall for consideration in this context are:

(a) on a statutory construction of POCA, is the statute effectively restricted to limb (1)(a) of art 149 of the FC, or does it include and encompass limbs (1)(a) to (f) inclusive of art 149 of the FC?

(b) as is evident from our oral decision, we concluded that POCA is restricted to limb (1)(a) and does not incorporate nor encompass the other limbs, namely (b)–(f) of art 149 of the FC; and

(c) does online gambling simpliciter fall within the purview of art 149(1)(a) and POCA, warranting its inclusion in item 5 to the First Schedule to POCA?

Issue (a): On a statutory construction of POCA, is the statute effectively restricted to limb (1)(a) of art 149 of the FC, or does it include and encompass limbs (1)(a)–(f) inclusive of art 149 of the FC?

[145] It is necessary to commence with a consideration of the relevant provisions of the FC as well as the POCA.

[146] Article 149 of the FC falls within Part XI of the FC which in turn is entitled 'Special Powers Against Subversion, Organized Violence and Acts and Crimes Prejudicial to the Public and Emergency Powers'.

[147] Article 149 of the FC itself is entitled 'Legislation against subversion, action prejudicial to public order, etc.' and provides:

> 149(1) If an Act of Parliament recites that *action has been taken or threated by any substantial body of persons, whether inside or outside the Federation —*
>
> (a) *To cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or*
>
> (b) ... ; or
>
> (c) ... ; or
>
> (d) ... ; or
>
> (e) ... ; or
>
> (f) *which is prejudicial to public order in, or the security of, the Federation or any part thereof,*
>
> ... any provision of that law designed to stop or prevent that action is valid

notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13*, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.* (Emphasis added.)

[148] The title to POCA reads as follows:

An Act to provide for the more effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons, and for matters incidental thereto.

[149] The recital to POCA reads as follows:

WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia *to cause, or to cause a substantial number of citizens to fear. organized violence against persons or property*;

AND WHEREAS Parliament considers it necessary to stop such action;

NOW, THEREFORE, pursuant to Article 149 of the Federal Constitution IT IS ENACTED by the Parliament of Malaysia as follows ... (Emphasis added.)

[150] The question that falls for construction is whether POCA when read in the context of art 149 of the FC is specifically focused on limb (1)(a) of art 149 of the FC or incorporates all six limbs from (1)(a)–(f).

[151] A perusal and construction of art 149(1) FC reveals that the provision is made in the FC for special powers accorded to Parliament to legislate against subversion, organised violence and acts and crimes which are prejudicial to the public as well as emergency powers, which may well be inconsistent with some of the fundamental liberties safeguarded in arts 5, 9, 10 and 13 of the FC. It is therefore a special power that allows for, inter alia, the preventive detention of persons, but in circumstances as specifically provided for in the situations set out in art 149(1) of the FC. It cannot be gainsaid that the very manner of provision of these special powers makes it clear that these powers are to be utilised sparingly and solely within the specified context of the FC and not otherwise.

[152] This brings to the fore the role of the High Courts and this court when dealing with such cases of preventive detention. It is evident from art 5(2) of the FC that the role of the High Court is one of constitutional importance, as it involves undertaking a vigilant and careful consideration of the legality of the detention of an individual who has been deprived of his liberty without the benefit of a fair trial. Liberty is the highest form of freedom, and preventive detention, while necessary, forfeits this freedom under specific conditions. This is recognised under the FC that systematically sets out by way of an exceptional

provision the special powers and the circumstances in which such powers are to be utilised.

[153] Therefore, when a complaint of unlawful detention, which it is alleged does not conform to the specific provisions set out in art 149 of the FC and its legislation is enacted pursuant to art 149 of the FC, it is incumbent upon the courts to undertake a vigilant scrutiny of the basis for the detention to ensure it complies strictly with art 149 of the FC.

[154] As stated in *Vijay Narain Singh v State of Bihar & Ors* (1984) 3 SCC 14, a decision of the Supreme Court of India, Venkataramiah J speaking for a majority of two out of a three-member bench stated:

> 32 ... It is well settled that the law of preventive detention is a hard law and therefore it should be strictly construed. Care should be taken that the liberty of a person is not jeopardised unless his case falls squarely within the four corners of the relevant law.

[155] In *Union of India v Yumnam Anand* (2007) 10 SCC 190 another decision of the Supreme Court of India, the principles relating to preventive detention were explained comprehensively and warrant repetition here:

> 8. In the case of preventive detention no offence is proved nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities ...
>
> But at the same time, a person's greatest of human freedoms ie personal liberty is deprived, and therefore, the laws of preventive detention are strictly construed and a meticulous compliance with the procedural safeguard, however technical, is mandatory. The compulsions of the primordial need to maintain order in society without which enjoyment of all rights including the right of personal liberty would lose all their meanings, are the true justifications for the laws of preventive detention. This jurisdiction has been described as a 'jurisdiction of suspicion', and the compulsions to preserve the values of freedom of a democratic society and social order sometimes merit the curtailment of individual liberty (see *Ayya v State of UP* (1989) 1 sec 374; 1989 sec (cri) 153; AIR 1989 SC 3641) To lose our country by a scrupulous adherence to the written law, said Thomas Jefferson, would be to lose the law, absurdly sacrificing the end to the means. No law is an end itself and the curtailment of liberty for reasons of State's security and national economic discipline as a necessary evil has to be administered under strict constitutional restrictions. No carte blanche is given to any organ of the State to be the sole arbiter in such matters.

[156] Article 149 of the FC which permits preventive detention, and legislation enacting such preventive detention therefore comprises an *exception to art 5(1) of the FC*. As an exception to the fundamental liberties enshrined in

Part II of the FC, it cannot arbitrarily be utilised to annul the right to liberty in art 5(1) of the FC. That right, comprising a part of a person's right to fundamental liberties, is to be accorded full effect, by ensuring that such persons are not arbitrarily detained by way of incarceration for long periods, without any prospects of a trial. Again, this underscores the need for the High Court and this court to adopt a vigilant scrutiny of the legality of the suspension, and ensure that it conforms and falls within the ambit of these special laws.

[157] As stated in *Regina v Secretary of State for the Home Department , ex parte Stafford* (1998) 1 WLR 503 (CA), a decision of the Court of Appeal in the United Kingdom:

> ... The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law.

[158] POCA is one such piece of legislation. A reading of the recital to POCA makes it clear that it refers solely to the criterion set out in limb (1)(a), namely to 'cause, or to cause a substantial number of citizens in the country to fear, organised violence against persons or property; ...'.

[159] It makes no reference to limbs (b)–(f) of art 149 of the FC, each limb of which is particularly crafted to deal with specific situations, namely creating disaffection against the Yang di-Pertuan Agong or any Government in the Federation — limb (b); or to promote feelings of and hostility between races — limb (c); or to procure the alteration by unlawful means of anything established by law — limb (d); action which is prejudicial to the maintenance or the functioning of any supply of service to the public — limb (e); or action which is prejudicial to public order in, or the security of the Federation — limb (f). It is evident that each limb deals with a different and separate form of, or situation of 'emergency'.

[160] Each of these limbs is separated within art 149 of the FC by the use of the word 'or' expressly. Such use of the word 'or' warrants a construction that each limb is to be read disjunctively. This in turn means that each limb is to be read as being applicable to disparate situations of emergency. In practical terms, it means that if it is intended to promulgate legislation pursuant to art 149 of the FC to deal with an emergency encompassing more than one situation envisaged under the various limbs of art 149 of the FC, then it is necessary to specifically and expressly invoke the particular emergencies a particular piece of legislation is envisaged to contain or suppress.

[161] The High Court judge held that the reference to art 149 of the FC in the paragraph immediately prior to the short recital, as shown below:

A AND WHEREAS Parliament considers it necessary to stop *such action*

NOW, THEREFORE, *pursuant to Article 149 of the Federal Constitution* IT IS *ENACTED* by the Parliament of Malaysia as *follows* ... (Emphasis added.)

was sufficient to incorporate all the separate and specific limbs of art 149 of the B FC.

[162] The learned judge, with respect, erred in so concluding as he failed to give any consideration to the matters referred to above in relation to statutory interpretation. He also failed to consider the use of the word 'such action' in the C first limb above as balded. That denotes the fact that the legislation in issue, namely POCA was enacted to stop 'such action'. 'Such action' in turn refers to the first paragraph of the long recital, namely:

WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia to cause, or to cause a substantial D number of citizens to fear, organised violence against persons or property.

[163] That in turn means that POCA is promulgated pursuant to art 149 FC specifically to stop action which causes or causes a substantial number of citizens to fear organised violence against persons or property. Not any of the E other limbs in art 149 of the FC. Therefore it is erroneous to seek to extend the scope and ambit of POCA to encompass all six limbs of art 149 of the FC when it is specifically promulgated to stop the particular emergency situation stipulated in art 149(1)(a) of the FC.

F **[164]** Finally a consideration of the preamble to POCA bears out and lends supported to the limited reading espoused above:

An Act to provide for the more effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other G undesirable persons, and for matters incidental thereto.

[165] It is directed at limb (a) as the control of criminals, members of secret societies, terrorists etc are all linked to organised violence. And that is fortified, as specified earlier, by the recital.

H **[166]** The High Court judge also stated that the preamble and long recital which comprise a part of POCA, as well as its contents are to be read purposively and with a view to giving effect to the object of the Act. That is, with respect, correct. However the need to read all statutes purposively (see I s 17A of the Interpretation Acts 1948 and 1967) does not and cannot detract from the role of the Judiciary to give effect to what is expressly enacted and not to extend the use of the legislation where it has been specifically stipulated to be utilised for the purposes of limb (a) only. It is not permissible to extend the express usage of the legislation, particularly in relation to legislation which is

specifically stated to be promulgated under special powers, which abrogate express freedoms guaranteed under Part II of the FC.

[167] More importantly perhaps, the High Court judge applied an erroneous and unwarranted method of statutory interpretation to POCA which is enacted pursuant to the restrictive and special emergency provisions set out in art 149 of the FC. This is the long accepted principle that any such emergency powers which restrict the fundamental liberties are to be read narrowly, rigidly and strictly. The rationale for reading such preventive detention restrictively has been set out above. It warrants reiteration that such detention is an anathema to civilised thought and democracy, that safeguards are built into art 149 of the FC in itself as safeguards to ensure that the limits are clearly circumscribed and are not abused. It is the function of the Judiciary to ensure that these limits are strictly complied with. And that is achieved in art 149 of the FC by the safeguards legislated in limbs (a)–(f) which mean that when legislation is promulgated by Parliament under this article, it has to be specifically directed at a particular form of emergency that has to be stopped. A proper reading of POCA read in conjunction with art 149 of the FC, reveals that it does not permit a lax, careless or cumulative approach to be taken to preventive detention, such that any act seen to be prejudicial may be fitted into any one or more of the specific categories outlined in art 149 of the FC.

[168] As a consequence of taking such an unwontedly liberal and cumulative approach to POCA and art 149 of the FC, the High Court judge then went on to consider whether online gambling simpliciter was prejudicial to public order under art 149(1)(f) of the FC. As such his approach thereafter in these appeals is flawed, as his primary focus was whether such activity caused 'public disorder' rather than whether such activity comprised activity which caused or caused a substantial number of citizens to fear organised violence against persons or property. Moreover in determining that online gambling caused public disorder, the High Court judge, with great respect, made general speculative conclusions which were entirely devoid of any form of prima facie evidence. Certainly there was nothing in the 'Pengataan Fakta' or 'Statement of Facts' which warranted any such conclusion.

[169] Having concluded that online gambling caused public disorder, the High Court judge relied on the majority decision in *Zaidi bin Kanapiah* in relation to whether online gambling fell within the purview of POCA. In that case, the facts are identical to the present case. The contention before the court was that the Minister had acted outside the scope of his authority in categorising online gambling simpliciter as being registrable under POCA. As this was ultra vires the Act, declarations and habeas corpus were sought. Additionally it was submitted that online gambling simpliciter did not fall within the purview of 'organised violence' as envisaged in art 149(1)(a) of the

A FC. The singular difference between *Zaidi bin Kanapiah* and the present case is that there, the appellants sought to have POCA declared unconstitutional for failure to recite the entirety of art 149 of the FC, whereas in the instant case the appellants seek declarations that online gambling simpliciter does not fall within the purview of POCA or art 149(1)(a) of the FC.

B

[170] In the majority decision on this issue in *Zaidi bin Kanapiah,* this court considered specifically whether the allegations made against the appellants there, which are in substance similar to those made against the appellants here, came within the scope of the POCA because online gambling simpliciter is not
C a crime of 'organised violence'.

[171] At the root of this issue is whether online gambling simpliciter falls within POCA because POCA is promulgated pursuant to art 149(1)(a) of the FC for the purpose of stopping activities of 'organised violence' as expressly
D stated there.

Zaidi bin Kanapiah — The majority decision holding that 'Online Gambling Simpliciter' fell within POCA

E

[172] Two of the five member coram delivered the majority reasoning relating to this issue. It will be recalled that three judges held that online gambling fell within the purview of POCA, while two judges held that it does not fall within the purview of POCA, although the majority held that POCA was not, in
F itself, unconstitutional.

[173] In *Zaidi bin Kanapiah,* the judgments of the majority of the coram delivered by Justice Vernon Ong FCJ and Justice Hasnah Hashim FCJ held, inter alia, as follows.

G

Justice Vernon Ong's rationale:

(a) in order to answer the question of whether online gambling simpliciter amounts to 'organised violence against persons or property', the legislative history of POCA 1959 and its predecessor legislation needs to
H be considered, including the Hansard in relation to the inclusion of gambling syndicates in the list of registrable offences;

(b) in Hansard, the then Minister of Interior and Justicemade reference to the POCA Bill as being designed to deal with 'secret society members,
I gangsters, thugs, extortioners, opium dealers, pimps and keepers of brothels and gambling dens' and the need to protect society and prevent these associations developing into a serious menace. This was amended in 2014 to its present form;

(c) after considering the dictionary meaning of 'organised' and 'violence' it

was concluded that 'organised violence against persons or property' ought to be juxtaposed with the meaning of the word 'unlawful gaming'. As 'unlawful gaming' is not defined in POCA, reliance was then placed on William Blackstone's reflections on the policy perspectives and practices 'of his class on gaming'. A history of gaming and its evils was considered and a nexus made, premised on various academic papers, between online gambling simpliciter and organised violence; and

(d) on this basis it was concluded that the association of illegal gaming activites with organised violence is irrefutable. There was concurrence with the majority judgment.

The majority judgment in relation to 'Unlawful Gambling' in *Zaidi bin Kanapiah* by Justice Hasnah Hashim FCJ:

(i) the issue was whether 'unlawful gaming' in para 5 of Part 1 of the First Schedule of the POCA falls beyond the ambit of 'organised violence against persons or property' (the principal argument sought a declaration that POCA itself was unconstitutional and this was one of the direct issues in relation to the preventive detention of the appellants there). Issue (i) here was a sub-issue within the principal argument. It is different in the instant case where the argument is solely related to whether online gambling simpliciter falls outside the ambit of POCA and whether, the Minister therefore acted outside the scope of his authority accorded to him under, or ultra vires POCA). We have addressed this issue earlier;

(ii) the amendment of POCA to include 'All persons concerned in the organisation and promotionof unlawful gaming' contained in para 5 of Part I of the First Schedule could not be ignored because it has been in existence since POCA was promulgated in 1959 when POCA became a preventive law laid down in Parliament at the time. The history of the section was considered, namely that the provision against gambling initially related to 'All persons habitually concerned in the organisation and promotion of unlawful gaming' up to its amendment in 2014 to its present form;

(iii) the intent of POCA was to be gleaned from its long title-to prevent crime and for the control of criminals, members of secret societies, terrorists and other undesirable persons and matters incidental thereto. The Common Gaming Houses Act 1953 was then considered. It was not included within POCA because it comprised legalised activity; and

(iv) the meaning of 'organised violence against persons or property' must be assessed through the context and the entire scheme of POCA. *Significantly this court held that those words must not be interpreted restrictively as submitted by the appellants in that case*.

A Our decision and analysis on this point

[174] Prior to the delivery of decision, we gave consideration to both the majority and minority decisions in *Zaidi bin Kanapiah,* and determined that the minority decision delivered by the Chief Justice, with respect, reflects the correct approach to be adopted when determining whether *online gambling simpliciter* falls within the purview of *para 5 of Part I of the First Schedule to POCA. We concluded that online gambling simpliciter does not fall within the purview or ambit of POCA as there is no nexus between the online gambling and organised violence as envisaged under POCA.*

[175] The surmise or postulation that it 'must' be linked or 'may' be linked to organised violence is entirely speculative and cannot reasonably form the basis, whether factually or legally, to endorse online gambling simpliciter as comprising an activity that is predicated on, or has led to organised violence. From a factual viewpoint, as stated earlier, there is nothing whatsoever in the statement of allegations to warrant such a conclusion.

[176] Legally, ie from the view point of statutory interpretation, the position is even more clear. Online gambling and organised violence are two separate and disparate matters. It is not tenable to construe the two separate matters as being inter-related without any form of factual basis, even prima facie, to support any such finding.

[177] 'Online gambling', while not specifically defined in the legal dictionaries, envisages a gambling service accessed remotely ie online, through the Internet where the participants gamble by depositing funds and playing games of chance, like sports betting, online poker etc.

[178] 'Organised violence' envisages the commission of acts of violence which cause significant pain to persons by an organised group, often a member of a crime syndicate. It may also encompass the issuance of threats of violence or intimidation or coercion.

[179] It is immediately apparent that on an objective assessment of these two separate activities, there is no immediate nexus or link between them per se. Save perhaps for the possibility of both being 'organised' in nature. However, that in itself is insufficient to warrant an inference that where there is online gambling simpliciter, there must follow, as a matter of course, organised violence. And vice versa, namely that where there is organised violence organised gaming must or does, subsist. It is the existence of a prima facie factual basis that warrants combining the two, or concluding that both elements subsist. It is only where both elements subsist, ie 'gambling online' and 'organised violence' that the matter falls for qualification under POCA.

[180] The fact that illegal gaming may in some, or even many instances result in violence, does not warrant the conclusion, reasonably or coherently, that online gambling simpliciter must include organised violence per se. Such an interpretation, with respect, does violence to the purpose and intent of POCA and fails to comply with the express and narrow provision set out in art 149(1)(a) of the FC.

[181] As explained at the outset and as expressly stipulated in the minority judgment of the Chief Justice:

(a) the inclusion of the art 149 of the FC recitals in emergency laws such as POCA 'serves as a constitutional safeguard ensuring that any such law is properly enacted for the purposes envisaged by that article';

(b) constitutional provisions that limit or derogate from the fundamental liberties in Part II of the FC must be read restrictively (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 at para 13);

(c) as stated in *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601; [2020] 1 LNS 1707 ('Selva Vinayagam') by Vernon Ong FCJ:

> [34] ... Where power is vested in a statutory authority to deprive the liberty of a person on its subjective satisfaction with reference of the specified matters, and if that satisfaction is stated to be based on a number of grounds or for a variety of reasons all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. Therefore strict compliance with the letter of the rule of law is the essence of the matter;

(d) the role of the Judiciary in interpreting the law does not mean that reliance is placed excessively or solely on Hansard or the stated purpose of the Bill when it was introduced. Parliament's intention must be drawn from an objective assessment of the words utilised in the legislation and not from statements by the promoters of the Act, as explained fully in *Zaidi bin Kanapiah* by the Chief Justice. Most importantly statutory construction particularly constitutional is a matter falling within the purview of the Judiciary;

(e) as stated at the outset in relation to the approach to be adopted in interpreting restrictive laws in relation to liberty of the person, it is important to adopt a restrictive approach which ensures that the fundamental liberty enshrined in art 5(1) of the FC is not trampled upon without adequate basis. It must be borne in mind that art 149 of the FC and hence POCA which permits preventive detention is an exception to art 5(1) of the FC. This is expressly recognised in the FC itself. To that end, while art 149 of the FC permits such legislation in the specific circumstances prescribed there, it must be borne in mind that it is indeed an exception that cannot be utilised to override art 5(1) of the

FC without sufficient basis. In this aspect we are unable to concur with the reasoning of the majority in *Zaidi bin Kanapiah* on this aspect of the decision, namely that in construing legislation restrictive of fundamental liberties, like POCA and other preventive detention, the approach to be taken is a liberal and broad approach, without regard to technicalities. The reverse is in point of fact, true. When a person is preventively detained it is the preventive legislation itself, ie POCA, art 149 of the FC and art 5(1) of the FC which are attracted. And in construing whether a particular act, series of acts or omissions fall within the purview of POCA or art 149(1) of the FC, it is the duty of the courts to ensure that the facts and circumstances brought before it directly and imminently leads to harm, danger or alarm amongst the citizens of the nation or the general public at large.

Conclusion on whether online gambling simpliciter falls within the purview of POCA

[182] *Therefore, we are constrained to depart from, and overrule that part of the majority decision in Zaidi bin Kanapiah relating to whether online gambling simpliciter falls within the purview of POCA. We held and now reassert that in our judgment, online gambling simpliciter does not fall within the purview of para 5, Part I, First Schedule of the POCA.*

ISSUE 3: DOES POCA APPLY TO CITIZENS AND NON-CITIZENS?

[183] The primary contention put forward by the appellants in both sets of appeals is that POCA does not apply to non-citizens or non-nationals of Malaysia. The basis for this submission is premised on the difference between art 151(1)(a) of the FC which utilises the word 'person' as compared to art 151(1)(b) of the FC which makes reference specifically to 'citizen' only. Article 151(1) of the FC reads as follows:

> 151(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention —
>
> (a) the authority on whose order *any person* is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), *the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be*;
>
> (b) *no citizen* shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow ... (Emphasis added.)

[184] The primary argument before us was that in view of the distinction between the use of the word 'person' under art 151(1)(a) of the FC and 'citizen' in art 151(1)(b) of the FC the entirety of those provisions ought to be 'read down' as it were such that POCA was only applicable to citizens and not to non-nationals like the appellants. Otherwise, it would result in citizens being accorded the opportunity to make representations before an Advisory Board and be heard on the issue as to why they should not be so preventively detained, while non-nationals or non-citizens were deprived of that opportunity under art 151(1)(b) of the FC. This it was argued ran awry of art 8 of the FC which guarantees equality of treatment under the law to all persons, regard less of whether they are citizens or non-citizens.

Our analysis

[185] In essence we are of the view that the use of the words 'person' in art 151(1)(a) of the FC and 'citizen' in art 151(1)(b) of the FC is deliberate. A basic tenet of constitutional interpretation is that the various articles in the FC are to be construed harmoniously. To our minds, both provisions are capable of being harmoniously construed, and do not, when read together, contravene other constitutional provisions, in particular art 8(1) of the FC. In this context, while legislation under art 149 of the FC may contravene some of the fundamental liberties as enshrined in arts 5, 9, 10 and 13 of the FC, it does not allow any derogation from arts 4 and 8 of the FC. In other words, compliance with art 8(1) of the FC is mandatory.

[186] Before us, it was argued that such a difference in treatment between citizens and non-citizens or non-nationals is discriminatory under art 8(1) of the FC. However, a more focused consideration warrants the conclusion that the difference in the use of the terms 'person' and 'citizen' in the two provisions respectively does not amount to unlawful discrimination under art 8(1) of the FC.

[187] Article 8(1) of the FC does not require all persons in all circumstances to be treated alike. Reasonable classification is permitted if it is based on intelligible differentia and shows a nexus between the basis of classification and the object, sought to be achieved by the statute in issue. As held by Eusoffee Abdoolcadeer FCJ *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116:

> The general basic principle culled from the authorities and judicially determined, succinctly put is that art 8(1) of the FC permits reasonable classification founded on intelligible differentia, having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question.

[188] In the instant appeals we concluded that art 8(1) of the FC was not contravened because the test above is met. This in turn is because the classification between citizens and non-citizens is a reasonable classification as the differential between them is distinct, discernible and rational. The purpose of art 151(1)(a) of the FC is to accord with the fundamental principles of natural justice by ensuring that any person, citizen or non-citizen, detained under legislation promulgated under art 149 of the FC, is informed of the grounds for his detention and accorded an opportunity to make representations in respect of such detention.

[189] Article 151(1)(b) of the FC affords an added or further constitutional safeguard in the form of a hearing before an Advisory Board which does not appear to be mandatory for non-citizens, as the term used in this paragraph is 'citizen' and not 'person'. It therefore appears that this further safeguard is not available to non-citizens.

[190] We pointed out above that there is an intelligible difference between citizens and non-citizens. Does that intelligible difference between a 'citizen' and a 'person' have a rational nexus with the policy and object of Part XI of the FC?

[191] The answer is in the affirmative as the primary function of Part XI of the FC is to accord special powers to Parliament to enact singular legislation specifically against subversion, organised violence, crimes prejudicial to the public and emergency powers. It is in view of the extreme nature of these acts and events which have potentially deleterious and destructive effects against the security and interests of the nation that such special powers are accorded to Parliament. This extends to permitting the promulgation of legislation that is not compliant with arts 5, 9, 10 and 13 of the FC.

[192] In these extreme circumstances, the rational and reasonable construction to be accorded to these differing modes of treatment is that the FC recognises and has accorded special powers to Parliament to legislate differently for non-citizens as compared to citizens in relation to matters of national security. The reason why there is a distinction between citizens and non-citizens is because the FC recognises that when it comes to national security, Parliament is entitled and therefore empowered to treat nationals and non-nationals in a different way.

[193] It is reiterated that Part XI of the FC deals specifically with national security and how to deal with threats against such risk. The risk posed by citizens and non-nationals may well be dissimilar and diverse. Accordingly, the promulgation of legislation which treats the two categories of persons differently is premised on a rational basis, namely distinct and intelligible

criteria, which meets the objective of art 149 of the FC. As such there is no contravention of art 8(1) of the FC. It might well have been different if preventive detention under POCA or legislation pursuant to art 149 of the FC expressly provided that such detention without trial was only available against non-citizens as compared to citizens. It would have been difficult to justify compliance with art 8(1) of the FC, given the clear preference accorded to citizens as opposed to non-citizens. it would also potentially contravene international standards.

[194] We are aware that in the instant case we are dealing with art 149 of the FC and that in dealing with the contention that it contravenes art 8(1) of the FC, we are applying the test normally utilised for legislation enacted pursuant to the FC rather than the articles of the FC itself. Notwithstanding this, the issue at hand is the same, namely whether art 8(1) of the FC has been contravened. The test therefore remains the same, namely whether there is a coherent basis for the differentiation premised on intelligible differentia which has a rational nexus to the policy or objective of the statute or the article in question.

[195] We, therefore, conclude that in view of the intelligible differentia between citizens and non-citizens or non-nationals more particularly in the context of the singular nature of art 149 of the FC which deals with the special powers afforded to Parliament in relation to national security and emergency, the lack of provision of this further safeguard in art 151(1)(b) of the FC does not offend art 8(1) of the FC. This is particularly so as the fundamentals of natural justice are accorded due recognition and effect in art 151(1)(a) of the FC.

[196] A reading of POCA itself discloses that there is nothing in that Act which discriminates against citizens and non-citizens as reference is made to 'person'. The function of the Prevention of Crime Board ('the Board') as stipulated in the Act makes it mandatory for all persons to appear before the Board prior to any period of preventive detention or release from detention being ordered by the Board. As such it cannot be said that the provisions of POCA run awry of art 8(1) of the FC.

[197] Further, in the instant appeals, notwithstanding the lack of such a mandatory requirement under art 151(1)(b) of the FC, all the appellants were afforded the opportunity to appear before the Advisory Board constituted under POCA and put forth their representations through counsel. As such they were, practically speaking, not deprived of the added safeguard afforded under art 151(1)(b) of the FC. This too detracts against any possible contravention of art 8(1) of the FC in these appeals.

[198] Finally, it should be noted that art 149(1) of the FC envisages the promulgation of legislation, including preventive detention legislation, where a substantial body of 'persons whether inside or outside the Federation' cause or threaten subversion, organised violence or crimes prejudicial to the public as well as in the event of an emergency. In promulgating such legislation therefore, Parliament is not constrained to restrict itself to citizens. It is open to Parliament to legislate against 'persons' in general, which includes non-nationals or non-citizens, where they are involved in such acts which constitute a grave threat to national security in the manner specified in art 149 of the FC. This is yet another reason why it would be legally incorrect to conclude that POCA only applies to citizens and not to non-citizens.

[199] For these reasons, we concluded that POCA applies to both citizens and non-citizens or foreign nationals.

[200] These are our reasons in full for allowing all the appeals in both categories of appeals comprising 25 in total, and ordering that the High Court ought to have ordered habeas corpus in all these appeals at the material time.

Appeals allowed.

Reported by Dzulqarnain Ab Fatar